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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-956

FORT VANCOUVER PLYWOOD COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Fort Vancouver Plywood Company (hereinafter referred to as "the Company") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing in part an order of the National Labor Relations Board (hereinafter referred to as "the Board" or "the NLRB") against the Company, which order requires the Company, *inter alia,* to bargain with Local Union No. 3-3, International Woodworkers of America (hereinafter referred to as "the Union").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 604 F.2d 596 and appears at Appendix A, *infra,* pages A-1 to A-13. The Amended Judgment of the Court of Appeals appears at Appendix B, *infra,* pages B-1 to B-7. The order of the Court of Appeals denying the Company's motion for rehearing appears at Appendix C, *infra,* pages C-1 to C-2. The Decision and Order of the National Labor Relations Board is reported at 235 NLRB No. 98 and appears at Appendix D, *infra,* pages D-1 to D-3. The Decision of the Administrative Law Judge is reported at 235 NLRB No. 98 (page 4) and appears at Appendix E, *infra,* pages E-1 to E-47.

JURISDICTION

The opinion of the Court of Appeals was entered on August 2, 1979 and its amended judgment was filed on September 17, 1979. The Court filed its order denying motion for rehearing on September 20, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the Board's finding that the Company violated Section 8(a)(3) of the National Labor Relations Act, as amended (29 U.S.C. § 158(a)(3)) (hereinafter referred to as "the Act" or "the NLRA") and enforcement thereof by the Court of Appeals improper under this Court's decision in *NL.R.B. v. Darlington Mfg. Co.,* 380 U.S. 263 (1965)?

2. May a bargaining order properly be used under this Court's decision in *N.L.R.B. v. Gissel Packing Company,* 393 U.S. 575 (1969) where the sequence of events unquestionably proves that the Board's ability to conduct a fair election has *not* been damaged?

3. Did the Board deny the Company due process of law by denying its motion to reopen the record for the purpose of producing newly discovered evidence which was material to the issues before the Board?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 158(a)(1) and (3)

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

STATEMENT OF THE CASE

The Company is a cooperative engaged in the production of plywood which was established in 1955 when 400 people, each investing $4,500, acquired the business as co-equal shareholders and themselves undertook to perform the various tasks in the plant (E.2).[1] Prior to 1976, the Company employed nonshareholder production workers from time to time to supplement the regular shareholder work

[1]References designate "A," "B," "C," "D," or "E" refer to the Appendices attached to this Petition. "C.T." references refer to the first volume of the Official Record before the Court of Appeals for the Ninth Circuit.

force. On June 14, 1976, the Company's Board of Directors (consisting of 7 elected shareholders) decided to terminate all nonshareholder production employees. For some time a growing number of shareholders had disfavored use of any nonshareholder production employees due to the strongly held belief that shareholder workers were more productive. Shortly thereafter, the Company's shareholders amended the Corporation's bylaws to preclude any further use of nonshareholder production employees (C.T. 31).

On June 23, 1976, the Union filed a charge with Subregion 36 of the Board alleging that the Company had violated Sections 8(a)(1), (3) and (5) of the Act by discharging its nonshareholder employees on June 14, 1976 and thereafter refusing to bargain with the Union (C.T. 4). On January 24, 1977, a complaint was issued by Charles M. Henderson, Regional Director for Region 19 of the NLRB, alleging that the conduct complained of in the above-described charge was violative of the Act (C.T. 5). On February 1, 1977, the Company filed an answer to this complaint denying its material allegations (C.T. 11).

Pursuant to the foregoing complaint, and subsequent amendments thereto, a hearing was held before Administrative Law Judge Richard J. Boyce which commenced on April 19, 1977 and closed on April 29, 1977. After the close of the hearing and prior to issuance of any decision by the Administrative Law Judge (hereinafter referred to as "the ALJ"), the Company moved to reopen the record for presentation of newly discovered evidence pursuant to Section 102.24 of the Board's Rules and Regulations, as amended (C.T. 27). An affidavit was filed in support of that motion which stated that witnesses previously unknown to

the Company came forward after the close of the hearing and offered to testify to certain facts which would drastically undermine the credibility of witnesses who had testified in the hearing on behalf of the General Counsel and also completely refute certain allegations in the complaint (C.T. 28-32). The ALJ denied this motion by written decision dated July 22, 1977 (C.T. 69). A motion for reconsideration filed by the Company was also denied by written decision dated July 27, 1977 (C.T. 77).

On November 3, 1977, the ALJ issued a recommended decision and order sustaining all allegations of the complaint. The ALJ's recommended decision and order failed to note or analyze a critical defense raised by the Company in its written argument, namely, the assertion that this Court's decision in *N.L.R.B. v. Darlington Mfg. Co., supra,* precludes any finding that the Company's conduct herein violated Section 8(a)(3) of the Act. Pursuant to Section 102.69 of the Board's Rules and Regulations, as amended, the Company submitted 113 timely exceptions to the ALJ's recommended decision and order with an accompanying brief (C.T. 106-124).

On April 4, 1978, the Board, by the action of a three-member panel, issued a decision and order adopting the ALJ's findings, conclusions and recommended order *pro forma,* without separately discussing the Company's defense under *N.L.R.B. v. Darlington Mfg. Co., supra,* or explaining any rationale for rejecting that defense.

The Board filed an application for enforcement of the above-described order in the Court of Appeals for the Ninth Circuit, dated May 24, 1978. Upon answering that

application, the Company filed a cross-petition for review of the same order, which answer and cross-petition was dated June 16, 1978 (C.T. 130-134). By order dated September 27, 1978, the Court of Appeals directed consolidation of the Board's application for enforcement and the Company's cross-petition for review.

After receipt of written and oral argument, the Court of Appeals issued an opinion granting enforcement of the Board's order in part only. The Court of Appeals denied enforcement to the Board's reinstatement order and found that any computation of back pay would have to await reexamination of the Company's reinstatement obligations by the Board. In denying enforcement to these two portions of the Board's order, the Court of Appeals found that the Company's usual contingent of nonshareholder workers was only a fraction of the number employed in June of 1976 and that, under these circumstances, the Board had a duty to consider how many employees, if any, the Company would have continued to employ but for the alleged unfair labor practices, and for how long (604 F.2d at 602). A timely motion for rehearing was denied by order filed September 20, 1979.

REASONS FOR GRANTING THE WRIT

The questions raised by the instant petition concern two highly critical cases in judicial delineation of the NLRA's scope and proper application. The first of those cases, *N.L.R.B. v. Darlington Mfg. Co., supra,* establishes the basic parameters for application of Section 8(a)(3) to mass terminations of all types. Those parameters were violated by the Board and the Court of Appeals in the

present case without any explanation whatsoever by either tribunal. If the decision below is left intact, the instructions of this Court contained within *N.L.R.B. v. Darlington Mfg. Co., supra,* will likely be ignored in many future cases, thereby deleteriously effecting numerous employers.

The second critical case involved in the questions raised herein is *N.L.R.B. v. Gissel Packing Co., supra.* In that decision, this Court established that the Board may utilize bargaining orders as a remedy for unfair labor practices under certain specified conditions. In the present case, the Board and the Court of Appeals went beyond the authorization of *N.L.R.B. v. Gissel Packing Co., supra,* and utilized a bargaining order in a situation drastically different from the factual pattern supporting prior bargaining orders. Every bargaining order enforced prior to the present case arose out of a situation where: (1) the Union gained evidence of majority support *before* (2) unfair labor practices undermining that support occurred. In the present case, the Union gained evidence of majority support only *after* the alleged unfair labor practices. The sequence of facts in this case offered irrefutable proof that any unfair labor practices occurring had not impinged upon the ability of employees to express themselves or the ability of the Board to conduct a fair and reliable election. This result is directly at odds with all other appellate authority applying *N.L.R.B. v. Gissel Packing Co., supra.*

The Board is making increasing resort to bargaining orders and this amplification upon the circumstances under which they will be relied upon should not be permitted without examination by this Court. Numerous employers and employees are effected by NLRB bargaining orders

each year and if the Board's present departure from *N.L.R.B. v. Gissel Packing Co., supra,* is not now examined many such employers and employees may be irrevocably so effected by the time this Court has another opportunity to speak to the appropriateness of bargaining orders in situations such as the present case, which do not fall within the parameters set forth in *N.L.R.B. v. Gissel Packing Co., supra.*

A. The Decision Below Conflicts with This Court's Decision in Darlington and the Intent of Congress Upon Passing the NLRA

In *Darlington,* the Supreme Court ruled that termination of all employees by an employer which closes its business does not violate the NLRA no matter what the motivation for the closure. The Court supported this holding with the following reasoning:

> "One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort *to obtain future benefits.* The discriminatory lockout designed to destroy the union, like a 'runaway shop,' is a lever which has been used to discourage collective employee activities *in the future.* But a complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide. It may be motivated more by spite against the union than by business reasons but *it is not the type of discrimination which is prohibited by the Act.* The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed. Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment en masse even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer's right to go out of business is no different." (Emphasis added.) 380 U.S. at 271.

As is evident from the foregoing quotation, the Court reached a very critical conclusion regarding the basic purpose of the NLRA's prohibition against discriminatory action. The Court concluded that Congress did not intend to proscribe all actions which might appear to constitute retribution for union activity. To the contrary, the Court found that Congress was primarily concerned with discriminatory acts designed to obtain *future benefits* for the employer. The Court cited "runaway shops" as a classic example of the evils with which Congress intended to deal. When an employer closes a facility in response to unionization and resumes operations elsewhere, it clearly expects its new employees to refrain from union affiliation in light of the experience of their predecessors. This obviously curtails the free expression of employee preference regarding representation and is well within the ambit of coercion which Congress sought to control through the Act.

The Court reasoned that permanent closure of a plant, while appearing equally retaliatory, must, nonetheless, be considered beyond the proscriptions of the NLRA. The number of employers which would rather withdraw from the employing market altogether than accept unionization must be considered few. This response will not bring any benefit to the employer in the future and generally requires

abandonment of capital investment. In essence such an employer "cuts off its nose to spite its face;" it loses as much or more than the effected employees and gains no lever to use for the purpose of coercing future employees. Since the action evokes its own punishment, it is not a likely response to unionization. The Court was unwilling to apply the NLRA in a fashion which would prohibit such responses to unionization without strong evidence that such was the intention of Congress. The NLRA was found totally devoid of any such legislative intent. 380 U.S. at 834.

The foregoing conclusion and reasoning of the Supreme Court require that Fort Vancouver Plywood Company's decision to terminate all nonshareholder employees on June 14, 1976 be found beyond the proscriptions of the NLRA. On that date, the owners of Fort Vancouver Plywood Company elected to permanently dispense with the use of nonshareholder employees. Production was curtailed to that level which could be successfully managed by the shareholder workers themselves. Since that date, no nonshareholder workers have been employed by the Company and its owners firmly intend to continue operating at a level within the capabilities of the shareholder workers themselves (C.T. 31).

In all significant respects, the decision made by Fort Vancouver Plywood Company was identical to the decision made by the owners of Darlington Manufacturing Company. Both companies permanently withdrew from the employing market. Both companies voluntarily forewent the opportunity to profit from the labors of their employees and neither company made any attempt whatsoever to utilize its actions as a lever which might coerce some other group

of employees in the exercise of protected rights. Quite simply, while the actions of both companies may have been motivated by retaliatory intent, neither company's actions were designed to result in any future benefit. Under the Supreme Court's reasoning in *Darlington,* neither company may be found to have violated Section 8(a)(3) of the Act.

This conclusion becomes even more apparent when a secondary holding reached by the Supreme Court in *Darlington* is considered. In *Darlington,* the Supreme Court specifically considered the legality of partial closures by employers which are purely motivated by a desire to retaliate against employees for their union activities. In accordance with the reasoning discussed above, the Supreme Court found that an employer that closes one of several plants in order to retaliate against employees for union activity does *not* violate the Act *unless* the partial closure was "motivated by a purpose to chill unionism in any of the remaining plants and the employer may reasonably have foreseen that such closing would likely have that effect."[2] By reaching this secondary holding, the Court stressed that its conclusions and reasoning regarding the scope of Section 8(a)(3) were *not* limited strictly to situations in which an employer completely ceases all operations. "A purpose to chill unionism" in the future is a critical element which

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[2]The Court specifically labeled these findings as a secondary holding in the case:

> "By analogy to those cases involving a continuing enterprise we are constrained *to hold,* in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under section 8(a)(3) *if* motivated by purpose to chill unionism in any of the remaining plants of the single employer and *if* the employer may reasonably have foreseen that such closing would likely have that effect." [Emphasis added.] 380 U.S. at 275.

must be present to establish any violation of Section 8(a)(3). While that element may be inferred in most situations where an employer takes discriminatory action in the context of an ongoing enterprise, it most certainly may not be inferred in a situation where an employer withdraws entirely from the employing market and commits itself to do without the profits which might be received from utilizing employees in the future.

Since the Supreme Court's decision in *Darlington,* the Board itself has consistently found employer's decisions to cease or restrict their employing activity to be outside the scope of Section 8(a)(3) *unless* a purpose to chill unionism among some remaining employees is shown. The Board's decision in *A.C. Rochat Co.,* 163 NLRB 421 (1967), is typical. The respondent in that case was an employer engaged in the sale, installation, and maintenance of air conditioning, heating and refrigeration equipment. After the initiation of union organizing activities, the respondent eliminated its sheet metal operations entirely, resulting in the layoff of 22 employees. The Board found that this decision was unquestionably triggered by union considerations but refused to find a violation of Section 8(a)(3) because there was no indication that the respondent sought to chill unionism among the company's continuing employees (a salesman and a bookkeeper). 163 NLRB at 422.[3]

The present case is completely indistinguishable from those cited above. Fort Vancouver Plywood Company did not act for the purpose of chilling unionism in the future. It has made a firm commitment to do without nonshare-

[3]See also *Motor Repair, Inc.,* 168 NLRB 1082 (1968).

holder workers in the future and has no desire whatsoever to utilize its past actions as a lever to coerce some group of future employees (C.T. 31). Under these circumstances, both the Board and Court of Appeals were required to find the Company's actions beyond the proscriptions of Section 8(a)(3) of the Act. The Supreme Court stated in *Darlington* that the Act, "*. . . does not compel one to become or remain an employer*" (380 U.S. at 271). The right set forth in these words is precisely the right which the Company exercised: *it ceased to be an employer and elected to become an owner operated business.* This Court should exercise jurisdiction in the present case to assure that Fort Vancouver Plywood Company is not stripped of the right guaranteed to it by *Darlington* and to further assure that neither the Board nor any Court of Appeals applies Section 8(a)(3) in the unprecedented fashion that it was applied herein.

B. The Board Abused Its Discretion By Failing to Grant the Company's Motion to Reopen the Record and Thereby Denied the Company Due Process of Law

The Company moved to reopen the record in this case on the grounds that newly discovered evidence would establish that numerous authorization cards introduced into evidence had been backdated. The Court of Appeals granted enforcement to the Board's denial of that motion on the grounds that the proffered evidence was immaterial in light of the conceded fact that the authorization cards relied upon *were* executed at some time, most likely June 16, 1979 (604 F.2d at 601). This conclusion ignores a very critical fact.

The Company desired to reopen the record for two central reasons (C.T. 28-32). First, it desired to demonstrate that many employees were coerced into signing cards by the use of promises and enticements such as the assurance that execution of an authorization card would render recapture of their jobs certain. Secondly, and equally importantly, the Company wished to demonstrate to the Administrative Law Judge that numerous witnesses offered by the General Counsel of the NLRB had proven their total unreliability by swearing to the authenticity of all information on cards which they personally conspired to backdate. The Court of Appeals totally ignored these two reasons for the Company's motion to reopen the record in deciding to enforce the Board's decision on this issue.

Quite clearly, when these two aspects of the evidence proffered by the Company are considered, that evidence cannot be deemed immaterial. If the Administrative Law Judge had reviewed this evidence, he might well have found that the Union *never* received evidence of *uncoerced* majority support among the effected employees and he also might well have determined that certain witnesses central to the General Counsel's case were totally unreliable. The potential impact of the testimony offered by the Company cannot be disregarded as blithely as it was in the outstanding decision of the Court of Appeals. This Court should exercise jurisdiction to assure that future NLRB proceedings are not conducted with such blithe disregard for the due process rights[4] of the employers and employees thereby effected.

[4]See, e.g. *I.B.E.W., Local 648 v. N.L.R.B.*, 440 F.2d 1184 (6th Cir. 1971); *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 386 F.2d 981 (D.C. Cir. 1967).

C. A Gissel-Type Remedy Is Completely Unprecedented and Inappropriate in the Facts of This Case Under the Prevailing Application of That Case By the Courts of Appeals

In *N.L.R.B. v. Gissel Packing Company, supra,* this Court examined the permissibility of compelling employer recognition of a labor organization without an NLRB election as a remedy for unfair labor practices. Prior to the Court's decision in *Gissel,* the Court of Appeals for the Fourth Circuit suggested that such a remedy might be utilized in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. The Supreme Court declined to expressly authorize the use of bargaining orders in this situation in *Gissel,* but it did authorize the use of bargaining orders in a situation differently defined.

The Court found that bargaining orders are appropriate where: (1) the union can demonstrate through authorization cards or otherwise that it once enjoyed majority support among the effected employees, (2) unfair labor practices with a tendency to undermine majority strength and impede the Board's election processes have occurred, and (3) the circumstances suggest that the union's prior showing of majority support is a more accurate reflection of employee sentiment than a post unfair labor practice NLRB election would be (395 U.S. at 614). The Court stressed that a bargaining order should never be used *unless* the preferred means of measuring employee sentiment, namely, an NLRB election, has become less reliable than other indicators of employee preference because of the employer's unfair labor practices.

The present case clearly does not satisfy the conditions set forth by the Supreme Court in *Gissel* for issuance of bargaining orders. The Union did not possess any evidence of majority status among the effected employees until *after* all of the unfair labor practices alleged in this case took place (604 F.2d at 601). It is clear, therefore, that the Employer's conduct, even if found to be impermissible, did not undermine any existing majority strength. Moreover, there is no reason to conclude that any conduct on the Employer's part impeded the NLRB's election process. There is no reason in the present case to abandon the use of a secret ballot election with all of its safeguards in favor of authorization cards.

In support of its finding that the Company violated Section 8(a)(5) of the Act, the Board asserts that the Union gained an uncoerced expression of majority support *after* termination of all nonshareholders. If, as alleged by the Board, the Company's nonshareholders were capable of freely expressing their preference on the heels of the conduct contested in this case, then surely they were capable of freely expressing that preference at some later date designated for an NLRB election. Quite simply, the positions adopted by the Board in this case *assume* that the employees involved *were* capable of freely expressing their preference even *after* occurrence of the unfair labor practices alleged. If this was indeed the case as asserted by the Board, then there is absolutely no need for nor any reason supporting a bargaining order. When it is clear that an NLRB election can accurately determine employee preference, that preferred means of ascertaining employees' desires must

not be abandoned in favor of some device more susceptible to impermissible interference.[5]

The Court of Appeals' decision in this matter applies *Gissel* to a fact situation completely dissimilar from that in which the Supreme Court found such a remedy to be appropriate. That extension of *Gissel* was completely inappropriate and unwarranted and the Company therefore respectfully urges the Court to exercise jurisdiction to prevent further unwarranted use of *Gissel*-type remedies.

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[5]Numerous Courts of Appeals have recognized that under *Gissel*, no bargaining order can be sustained unless the Board's reasons for preferring authorization cards over a Board conducted election are well-articulated. See, e.g., *N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1978); *N.L.R.B. v. Armcor Industries, Inc.*, 535 F.2d 239, 244 (3rd Cir. 1976); *Peerless of America, Inc. v. N.L.R.B.*, 484 F.2d 1108; 1118-19 n.16 (7th Cir. 1973). In the present case, neither the Board nor the Court of Appeals gave any reason whatsoever for preferring authorization cards over a Board conducted election. This omission must be considered fatal to the Board's attempted bargaining order given the overwhelming indication, as summarized in the text above, that a fair NLRB election *could* be conducted among the effected employees.

CONCLUSION

For the reasons set forth herein, the Company respectfully urges this Court to grant its Petition for a Writ of Certiorari.

Dated: December 17, 1979.

Respectfully submitted,

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(Appendices Follow)

Appendices

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, v. Fort Vancouver Plywood Company, Respondent.	No. 78-2214
Fort Vancouver Plywood Company, Petitioner, v. National Labor Relations Board, Respondent.	No. 78-2288

[Filed Aug. 2, 1979]

OPINION

On Petition to Review a Decision of the
National Labor Relations Board

Before: HUFSTEDLER and GOODWIN, Circuit Judges and JAMESON*, District Judge.

GOODWIN, Circuit Judge:

The National Labor Relations Board (NLRB) petitions for enforcement of its order entered upon a finding that Fort Vancouver Plywood Company committed unfair labor

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

practices. The Board ordered the company to cease certain practices, to bargain with the union, and to reinstate and compensate for lost earnings 72 former employees. Fort Vancouver Plywood cross-petitions to set the order aside.

I. FACTS

Fort Vancouver Plywood Company is a worker-owned Washington corporation. Not all workers are shareholders, however. The Company has often employed nonshareholders as fill-ins during periods of peak production or as replacements for vacationing shareholder-workers. The number of nonshareholders in the work force has varied from time to time. The Board contends that the number has ranged from 30 to 70, but concedes that it also has fallen to 2 or 3. The company claims that the figure has occasionally dropped to zero.

For reasons not material here, the employment of nonshareholders has always been a matter of contention within the company's management. Three of the seven directors (also worker-shareholders) consistently advocated ending the employment of nonshareholders altogether. They could not convince any of the other directors to join with them until June 14, 1976. On that day, all 72 nonshareholders then employed were fired.

The dismissals came as Local Union No. 3-3 of the International Woodworkers of America was taking steps to organize the nonshareholder contingent. On June 9, the union had held an organizational meeting, at which it distributed authorization cards. By June 16, the union had acquired signed cards from a majority of nonshareholder employees, and then demanded recognition from the company. All 72 nonshareholders had been discharged two days earlier, however, and the company refused to recognize the union. The union then filed charges with the Board, which issued a complaint.

Following a lengthy hearing, the administrative law judge found that the company had violated three subsections of the National Labor Relations Act: section 8(a)(1), by illegally coercing and interrogating employees; section 8(a)(3), by the firings; and section 8(a)(5), by refusing to bargain with the union. 29 U.S.C. § 158(a)(1), (3), (5). He ordered the company, *inter alia,* to bargain with the union and to reinstate the discharged employees with back pay. The Board affirmed the administrative law judge's findings, conclusions, and remedies.

II. VIOLATIONS

We agree with the Board's conclusions that Fort Vancouver Plywood violated Section 8 of the Act in several respects.

A. *Section (8)(a)(1).*

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to organize. On petition for enforcement, the Board's ruling that the company violated section 8(a)(1) will stand as long as there is substantial evidence to support it. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490 (1951); *Lozano Enterprises v. NLRB,* 357 F.2d 500, 502 (9th Cir. 1966). There is more than sufficient evidence here to support the Board's finding

that the company violated section 8(a)(1) by making coercive statements to its employees.[1]

B. *Section 8(a)(3).*

Under section 8(a)(3) of the Act, an employer may not discharge employees because of their union activities or sympathies. *NLRB v. Magnusen,* 523 F.2d 643, 645 (9th Cir. 1975). *See also NLRB v. Tesoro Petroleum Corp.,* 431 F.2d 95, 97 (9th Cir. 1970). Violation *vel non* of the subsection depends on the employer's motive for terminating

[1]Company officials questioned employees about their involvement with the union, threatened to close the plant if it went union, and told employees they were being laid off because of their pro-union sentiment. Interrogation of employees about union activities is inherently suspect; absent express assurances against reprisal, it is coercive under section 8(a)(1). *NLRB v. Super Toys, Inc.,* 458 F.2d 180, 182-83 (9th Cir. 1972). The company points to no such assurances here. Threats of plant closure are also coercive unless, unlike the case here, they are phrased as economic predictions based on objective facts beyond the employer's control. *Hertzka & Knowles v. NLRB,* 503 F.2d 625, 627-28 (9th Cir. 1974), *cert. denied,* 423 U.S. 875 (1975). *See also NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Informing employees that they are being discharged because of their support for a union is also a violation of section 8(a)(1). *NLRB v. L. B. Foster Co.,* 418 F.2d 1, 2-3 (9th Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

The company contends that the offending statements were all capable of noncoercive interpretations. It is not for us, however, to weigh differing interpretations. The factfinder need only be reasonable in his inference that the company interfered with or coerced employees in the exercise of their rights. *See Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080-82 (9th Cir. 1977). There was nothing unreasonable about the inferences drawn by the administrative law judge and sustained by the Board.

Fort Vancouver Plywood also argues that some of the testimony against it (in several cases uncontroverted) was not credible. The administrative judge is in a better position than we are to determine who is believable. *NLRB v. Bell Manufacturing Division,* 483 F.2d 150, 151-52 (9th Cir. 1973). "[T]he decision of the Board to resolve the conflicting testimony by crediting that of [one witness rather than another] is binding on this Court." *NLRB v. Deutsch Co.,* 445 F.2d 901, 905 (9th Cir. 1971), *cert. denied,* 405 U.S. 988 (1972).

employment; the task of determining that motive is "particularly within the purview of the Board." *NLRB v. Vangas, Inc.,* 517 F.2d 747, 748 (9th Cir. 1975), *quoting NLRB v. Winkel Motors, Inc.,* 443 F.2d 38, 40 (9th Cir. 1971). In determining motive, the Board may consider circumstantial and direct evidence, and its inferences will prevail if reasonable and supported by substantial evidence on the record as a whole. *NLRB v. Miller Redwood Co.,* 407 F.2d 1366, 1369 (9th Cir. 1969). *See also Santa Fe Drilling Co. v. NLRB,* 416 F.2d 725, 729-30 (9th Cir. 1969) (citing cases).

After hearing testimony for and against the proposition that all 72 nonshareholders were fired for valid business reasons, the judge concluded that the mass discharge was motivated by management's anti-union sentiment. There was ample evidence that the company's directors were aware of the attempted unionization and that the threat precipitated the decision to fire all nonshareholders. The judge's conclusion that a desire to stop unionization outweighed other business purposes was reasonable and well-supported.

The company also argues that, even if illegally motivated, the firings were permissible under *Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263 (1965). In *Darlington,* the Supreme Court held it is not a statutory violation for an employer to fire all its employees and close down its business even though its motive may be to thwart unionization. Fort Vancouver Plywood contends that it fired all its employees. According to the company, since the only workers it retained were shareholders, it

retained no employees. The company therefore claims that the *Darlington* exception to section 8(a)(3) applies.

We need not pass on cross-petitioner's attempt to draw a line bewteen shareholder "workers" and nonshareholder "employees". It is clear that the Supreme Court meant its exception in *Darlington* to apply only to the complete liquidation of a business.[2] *See Great Chinese American Sewing Co. v. NLRB,* 578 F.2d 251, 255 (9th Cir. (1978). Anti-union firings that fall short of terminating business operations completely, such as the discharges here, violate section 8(a)(3). *See Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. at 274-75.

C. *Section 8(a)(5).*

On June 16, 1976, having obtained authorization cards from a majority of nonshareholders, the union demanded recognition. The company refused to bargain with the union. It alleges that the union's majority was obtained only after the nonshareholders were fired, and that several cards were backdated to show union support before the firings. Two signers admitted backdating their cards, and the company urges that others did, too.

Assuming arguendo that there was extensive backdating, the fact remains that a majority had signed cards for the union on or before June 16, the date that Fort Vancouver Plywood claims the backdated cards really were signed. Backdating does not negate the expression of desire for

[2]"We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 273-74 (1965) (footnote omitted).

union representation. *Ultra-Sonic De-Burring, Inc.,* 233 NLRB No. 165 (1977), *enforced,* 593 F.2d 123 (9th Cir. 1979). When cards have been backdated, the proper course is to determine when they were signed and to count them as expressing union support as of that date. *See, e.g., Essex Wire Corp.,* 188 NLRB 397 (1971).

The administrative law judge here concluded that the union had majority support on June 16, two days after the firings. Even if there was considerable backdating, this would not affect the finding of majority support shortly *after* the illegal discharges.

The finding is sufficient to make out a violation of section 8(a)(5) even though some members of the pro-union majority may have been fired two days before it signed the cards. An employer may not thwart a pro-union movement by improperly discharging employees before they formally express their wishes.

For the same reason, the failure to reopen the hearings to receive newly discovered evidence relating to the backdating was not error. The administrative law judge has considerable discretion in the grant or denial of a motion to reopen. *NLRB v. Victor Otlans Roofing Co.,* 445 F.2d 299, 300 (9th Cir. 1971); *NLRB v. Seafarers Union,* 496 F.2d 1363, 1365 (5th Cir. 1974). It was hardly an abuse of discretion not to reopen here. As the Board noted in affirming the denial of the motion to reopen, "even if such evidence were to show that additional cards had been backdated, this fact alone would not vitiate the finding that the union possessed valid authorization cards from a majority of unit employees on June 16 * * * ."

III. REMEDIES

A. *Bargaining order.*

Fort Vancouver Plywood maintains that even if it violated the Act, two of the Board's remedies were improper. It objects, first of all, to the bargaining order. The company contends that it is entitled to an election.

Our standard of review gives a broad presumption in favor of the remedy selected by the NLRB. *NLRB v. Longshoremen's and Warehousemen's Union,* 549 F.2d 1346, 1355 (9th Cir.), *cert. denied,* 434 U.S. 922 (1977). Where the employer has been guilty of multiple unfair practices, a bargaining order is proper if such an order would be the only way to effectuate employees' union preferences. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *See NLRB v. Prineville Stud Co.,* 578 F.2d 1292, 1296 (9th Cir. 1978). A determination that a bargaining order is needed to rectify the effect of past practices will not be upset if substantial evidence supports the Board's conclusion. *NLRB v. Ultra-Sonic De-Burring, Inc.,* 593 F.2d at 124 (citing cases).

As required by *NLRB v. Pacific Southwest Airlines,* 550 F.2d 1148, 1152 (9th Cir. 1977), the judge set out his reasons for ordering the company to bargain with the union and stated why the alternative of an election was unsatisfactory to protect employees' section 8 rights. Particularly in view of the repeated and drastic nature of the coercive behavior and discharges, the judge reasonably concluded that only a bargaining order would effectuate employees' expressed preference for the union.

B. *Reinstatement order and back-pay award.*

Finally, the company argues that the reinstatement order was improper. The Board ordered the company to restore all 72 nonshareholders to their jobs, or to "substantially equivalent jobs" if the old jobs no longer existed, and to make up employees' lost earnings. Fort Vancouver Plywood contends that eventually it would have "drastically reduced or eliminated" the nonshareholder work force, regardless of unionization. Therefore, the company concludes, the Board's order improperly gave the discharged employees more than they would have gotten without company violations of the Act. We agree that the reinstatement portion of the Board's order is unenforceable.

Under section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c)[3], the Board's remedial powers include wide discretion to fashion and issue reinstatement and back-pay orders. *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 176 (1973). These orders are frequently enforced by this court to remedy discriminatory discharges (*e.g., NLRB v. Vangas, Inc.,* 517 F.2d at 748), especially when the employer has been guilty of a mass firing of all workers in a bargaining unit (*e.g., K. B. & J. Young's Super Markets, Inc. v. NLRB,* 377 F.2d 463, 465 (9th Cir. 1967)).

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[3] 29 U.S.C. § 160(c) states in relevant part:

"* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *."

In exercising its discretion, however, the Board's task is to find a remedy that will "restore the economic status quo that would have obtained but for [the] wrongful discharge * * * ." *Golden Gate Bottling Co. v. NLRB*, 414 U.S. at 188-89. *See Southern Tours, Inc. v. NLRB*, 401 F.2d 629, 633 (5th Cir. 1968). Remedies that award employees more than they would have obtained but for the violations are punitive, not compensatory, and thus improper. *Packing House & Industrial Services, Inc. v. NLRB*, 590 F.2d 688, 697 (8th Cir. 1978) (en banc). Where the jobs affected by the illegal discharge would have been phased out anyway, regardless of the unfair labor practices, the Board must tailor its remedy to reflect the situation but for the violations. *Florsheim Shoe Store Co. v. NLRB*, 565 F.2d 1240, 1247 (2d Cir. 1977).

Florsheim is especially relevant here. The Board had determined that anti-union animus, and not valid business reasons, caused the company to discharge its part-time employees. The court of appeals upheld the finding of discriminatory discharge, but it refused to enforce the Board's reinstatement order. Although legitimate business purposes may not have actuated the firings, there was much evidence that the company would have gradually terminated its part-time staff anyway.

> " * * * Florsheim was entitled to have the Board shape its order in a form that did not impose a duty to recreate for an indeterminate period jobs that would have been 'phased out' of existence over time whether or not there had been a dispute over unionization. * * * On the issues of remedy, * * * the existence and the validity of the economic policy and the effect its implementation would have have [sic] on the duration of part-time jobs and the number of jobs that would exist over time was important." 565 F.2d at 1247.

Because the Board had not considered how long the jobs would have lasted but for the unfair practices, the case was remanded for appropriate findings.

In the instant case, the Board admits that Fort Vancouver Plywood's usual contingent of nonshareholders was only a fraction of the number employed in June 1976. It concedes that three of the company's seven directors had long urged the company to do away with all nonshareholder employment. The NLRB agrees as well that many shareholder-workers not on the board of directors of the company also favored ending the use of outside workers altogether.

Under these circumstances, the Board had a duty to consider how many employees, if any, the company would have continued to employ but for the unfair labor practices, and for how long. The record indicates that neither the judge nor the Board in review gave any consideration to whether some or all of the temporary employees eventually would have lost their jobs for acceptable business reasons. Failure to inquire how many employees would have stayed on but for the section 8 violations makes the remedy punitive, and so unenforceable. *NLRB v. J. S. Alberici Construction Co.*, 591 F.2d 463, 470 n.8 (8th Cir. 1979).

The Board contends that the exact terms of the reinstatement order are properly left for subsequent determination, and do not affect the order's enforceability. It argues that this court should enforce the order and reserve

for compliance proceedings consideration of how many employees would have remained on the job. But the Board's premise is incorrect. All 72 nonshareholders eventually might have lost their jobs, making a reinstatement order improper altogether. The Board also overlooks the fact that its order requires the reinstatement, not of some nonshareholders, but of exactly 72 discharged workers. The precision in the administrative law judge's opinion and in the Board's order makes it clear that no further proceedings were contemplated regarding the number of employees to be reinstated. *Compare NLRB v. J. S. Alberici Construction Co.*, 591 F.2d at 470.

Enforcement of an order so specific would deny the company an opportunity to show that fewer than 72 jobs would have been available regardless of its unfair practices. The reinstatement order therefore cannot stand. *M.S.P. Industries, Inc. v. NLRB,* 568 F.2d 166, 180 (10th Cir. 1977). On the other hand, the order for back pay is indefinite, properly leaving for compliance proceedings the exact determination of amounts owing. *Great Chinese American Sewing Co. v. NLRB,* 578 F.2d at 255-56 (citing cases). Back pay awards to wrongfully discharged employees are within the Board's discretion under 29 U.S.C. § 160(c), *supra,* and we enforce this portion of the Board's order.

IV. CONCLUSION

We remand to the Board for reconsideration of the reinstatement part of its order in light of this opinion. Back pay will have to be computed after reinstatement numbers are determined. All other portions of the order are enforced.

The Board will prepare and submit an appropriate form of judgment.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, v. Fort Vancouver Plywood Company, Respondent.	No. 78-2214
Fort Vancouver Plywood Company, Petitioner, v. National Labor Relations Board, Respondent.	No. 78-2288

[Filed Sept. 17, 1979]

AMENDED JUDGMENT

Before: HUFSTEDLER and GOODWIN, Circuit Judges and JAMESON*, District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Fort Vancouver Plywood Company, Vancouver, Washington, its officers, agents, successors, and assigns on April 4, 1978 and upon a petition filed by the above-named Respondent to review the Board's said Order.

*The Honorable William J. Jamseon, Senior United States District Judge for the District of Montana, sitting by designation.

The Court heard argument of respective counsel on June 14, 1979, and has considered the briefs and transcript of record filed in this cause. On August 2, 1979, the Court, being fully advised of the premises, handed down its opinion in which it granted enforcement of the Board's Order in part and remanded the case to the Board for reconsideration of the reinstatement part of its order in light of the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Fort Vancouver Plywood Company, Vancouver, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling nonshareholder employees that it would have to start "breaking in" the new shareholders in case the nonshareholders "go union on us"; or telling nonshareholder employees that it would "just shut down" should Local Union No. 3-3, International Woodworkers of America, AFL-CIO, (hereinafter called the Union) get in; or interrogating nonshareholder employees whether they had "signed up" with the Union, about what "went on" at a union organizing meeting, and who was "behind" the union activities; or telling nonshareholder employees, with reference to their discharges and their union activities, that they had "asked for it" and had "screwed themselves"; or telling nonshareholder employees that their mass discharge was because of "that union stuff."

(b) Discharging or otherwise discriminating against nonshareholders because of the union activities of some or all of them.

(c) Refusing to recognize the Union as the exclusive collective-bargaining representative of its nonshareholder employees in the appropriate unit, described below.

(d) In any other manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take this affirmative action:

(a) Upon request, recognize and bargain with the Union as the exclusive representative of all nonshareholder employees in the appropriate unit; and, if an understanding is reached, embody it in a signed document if asked to do so. The appropriate unit is:

> All nonshareholder production and maintenance employees employed by Fort Vancouver Plywood Company in its plant at Vancouver, Washington, excluding all shareholders, prospective shareholders, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Make the 72 nonshareholders unlawfully discharged on June 14, 1976, whole for any loss of earnings and/or benefits suffered by reason of the unlawful discharges.

(c) Post at its plant in Vancouver, Washington, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19 of the National Labor Relations Board (Portland, Oregon) after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are cus-

tomarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:
Judges:

/s/ Shirley M. Hufstedler, CJ
Shirley M. Hufstedler, CJ

/s/ Alfred T. Goodwin, CJ
Alfred T. Goodwin, CJ

/s/ William J. Jameson, DJ
William J. Jameson, DJ

RICHARD H. DEANE, Clerk

A True Copy
23 Oct. 1979

ATTEST:
OSCAR TAGLE, Deputy Clerk

APPENDIX

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing in Part and Remanding in Part an Order of the National Labor Relations Board

AN AGENCY OF
THE UNITED STATES GOVERNMENT

The trial held in Portland, Oregon, on April 19-22 and 25-29, 1977, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

The National Labor Relations Act gives all employees the following rights:

To organize themselves;

To form, join, or support unions;

To bargain as a group through a representative they choose;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT tell nonshareholder employees that we would have to start "breaking in" the new shareholders in case the nonshareholders "go union on us"; or tell nonshareholder employees that we would "just shut down" should the Union get in; or interrogate nonshareholder employees whether they had "signed up" with the Union, about what "went on" at a union organizing meeting, and who was "behind" the union activities; or tell nonshareholder employees, with reference to their discharges and their union activities, that they had "asked for it" and had "screwed themselves"; or tell nonshareholder employees that their mass discharge was because of "that union stuff."

WE WILL NOT discharge or otherwise discriminate against nonshareholders because of the union activities of some or all of them.

WE WILL NOT refuse to recognize Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive collective bargaining representative of our nonshareholder employees in the appropriate unit, described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in their exercise of rights under the Act.

WE WILL, upon request, recognize and bargain with Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive representative of all nonshareholder employees in the appropriate unit; and, if an understanding is reached, embody it in a signed document if asked to do so. The appropriate unit is:

All nonshareholder production and maintenance employees employed by Fort Vancouver Plywood Company in its plant at Vancouver, Washington, excluding all shareholders, prospective shareholders, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Make the 72 nonshareholders unlawfully discharged on June 14, 1976, whole for any loss of earnings and/or benefits suffered by reason of the unlawful discharges.

FORT VANCOUVER PLYWOOD COMPANY

(Employer)

Dated ..... By .....

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office 29th Floor, Federal Building, 915 Second Avenue, Seattle, Washington 8174, Telephone Number: (206) 442-7372.

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, v. Fort Vancouver Plywood Company, Respondent.	No. 78-2214
Fort Vancouver Plywood Company, Petitioner, v. National Labor Relations Board, Respondent.	No. 78-2288

[Filed Sept. 20, 1979]

ORDER

On Petition to Review a Decision of the
National Labor Relations Board

Before: HUFSTEDLER and GOODWIN, Circuit Judges and JAMESON*, District Judge.

On August 16, 1979, Fort Vancouver Plywood Company filed its petition for rehearing and suggestion for rehearing en banc.

*The Honorable William J. Jamseon, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

United States of America
Before the National Labor Relations Board

Fort Vancouver Plywood Company, and Local Union No. 3-3, International Woodworkers of America, AFL-CIO	Case 36 CA—2930

DECISION AND ORDER

On November 3, 1977, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

cided to affirm the rulings,[1] findings,[2] and conclusions of

[1]After the close of the hearing in this case but before briefs to the Administrative Law Judge were due, Respondent filed a motion to reopen the record for presentation of newly discovered evidence. The affidavit of one of the attorneys filing the motion states that following the close of the hearing one of the alleged discriminatees informed him that the Union obtained a majority of the signed authorization cards by means of threats, promises, and coercion. In addition, the attorney alleges the newly discovered evidence will show that approximately 20 authorization cards were signed after the employees had been terminated and that the Union ordered those employees to backdate their signatures. The Administrative Law Judge denied the motion, finding that the circumstances underlying the signing of the 41 authorization cards had been extensively litigated, that various card-signers had been rigorously cross-examined, and that the Respondent had presented two witnesses, Scott Myers and James Neddo, who testified regarding the backdating of various authorization cards which had been signed subsequent to the employees' termination. He therefore concluded that no showing had been made that the additional evidence would shed new light on the validity of the authorization cards. We find that the Administrative Law Judge properly denied the motion to present this evidence. In reaching this conclusion, we note that the materials accompanying the motion fail to indicate any specific evidence which would affect the results herein. In addition, Respondent's witnesses Myers and Neddo each testified that they were present at the nonshareholder employee meetings conducted after the mass terminations. It is apparent that the evidence underlying the motion to reopen the record has not been shown to have been previously unavailable inasmuch as this additional evidence would rely primarily or exclusively on what transpired at these meetings which Myers and Neddo had attended. Furthermore, even if such evidence were to show that additional cards had been backdated, this fact alone would not vitiate the finding that the Union possessed valid authorization cards from a majority of unit employees on June 16, 1976, or that the testimony of individuals who had participated in such backdating should be generally discredited where such testimony related to events other than those surrounding the signing of authorization cards. Finally, Respondent's motion and accompanying documents indicate that it first learned of the additional evidence on May 3, 1977, 4 days after the hearing ended, and that it delayed filing its motion to reopen the record until June 24, 1977. In the absence of an explanation for this additional delay, we conclude the absence of such an explanation provides additional grounds for denying the motion.

[2]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Fort Vancouver Plywood Company, Vancouver, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. April 4, 1978

.....

John H. Fanning, Chairman

.....

Howard Jenkins, Jr., Member

.....

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[3]The Union asks that we order Respondent to compensate it for attorneys' fees and litigation costs incurred in connection with the present unfair labor practice charges, for ongoing organizational costs, and for the loss of initiation fees and monthly dues from membership applicants. An award of attorneys' fees and other expenses is appropriate only where a respondent raises patently frivolous defenses. *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). Because the defenses here are debatable, rather than frivolous, we made no such award.

APPENDIX E

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Fort Vancouver Plywood Company and Local Union No. 3-3, International Woodworkers of America, AFL-CIO	Case No. 36-CA-2930

Dale B. Cubbison, Esq.,
for the General Counsel.

Lenihan, Ivers & McAteer by
William F. Lenihan and
Stephen R. Black, Esqs., and
Littler, Mendelson, Fastiff &
Tichy by George J. Tichy II,
Esq., for the Respondent.

A. C. Roll, Esq., for the
Charging Party.

DECISION

RICHARD J. BOYCE, Administrative Law Judge:

I. Statement of the Case

This case was tried before me in Portland, Oregon, on April 19 through 22 and April 25 through 29, 1977. The charge was filed June 23, 1976, by Local Union

No. 3-3, International Woodworkers of America, AFL-CIO ("Union"). The complaint issued January 24, 1977, was amended February 4 and during the trial, and alleges that Fort Vancouver Plywood Company ("Respondent") has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act ("Act").

The parties were permitted during the trial to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Post-trial briefs were filed for the General Counsel, for Respondent, and for the Union.

II. Jurisdiction

Respondent is a Washington corporation engaged in the manufacture of plywood at a plant in Vancouver, Washington. It annually sells products valued in excess of $50,000 directly to customers outside Washington, and annually purchases materials valued in excess of $50,000 directly from suppliers outside Washington.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

III. Labor Organization

The Union is a labor organization within Section 2(5) of the Act.

IV. Issues

The complaint alleges:

(a) That Respondent discharged its entire complement of nonshareholder production and maintenance employees (some 72 people) on June 14, 1976, because of the union activities of some, thereby violating Section 8(a)(3) and (1);

(b) That Respondent threatened and interrogated its nonshareholder employees concerning the Union at various times from June 9 to 14, 1976, thereby violating Section 8(a)(1); and

(c) That the union achieved a card majority among the nonshareholders in an appropriate unit, and that that, in combination with Respondent's misconduct, warrants a remedial order that Respondent recognize and bargain with the Union; and, therefore, that Respondent's denial of the Union's demands for recognition violated Section 8(a)(5) and (1).

The answer denies any wrongdoing.

V. The Alleged Unfair Labor Practices

A. *Introductory Facts*

The nature of Respondent. Respondent is a cooperative qualifying for preferred tax assessment under the Internal Revenue Code. It came into being in 1955 when 400 people, each investing $4,500, acquired the business as coequal shareholders and themselves undertook to perform the various tasks in the plant.

The business is run by a seven-person board of directors, chosen from among and by the shareholders in yearly elections. The directors at relevant times were Gerald McChesney, chairman and corporate president; Lyndon Rumsey, corporate secretary; Walter Huttula; Ronald Reibel; Melford Stroup; Stanley Swanson; and Charles Wright. The directors regularly meet on the third Thursday of each month, and frequently have special meetings as well, while continuing in their usual jobs in the plant.

Special meetings can be called by either the president or the secretary.

Day-to-day implementation of board policy is delegated to a full-time general manager, who need not be a shareholder. The general manager at relevant times was Roland Mill, a nonshareholder with years of management experience in the plywood industry. Mill also served as sales manager. Immediately beneath the general manager in the day-to-day operational hierarchy is a full-time plant superintendent, who likewise need not be a shareholder. The plant superintendent at relevant times was Richard Grenier, who began with Respondent as a shareholder-worker in 1963.

Each shareholder-worker owns one share of Class "A," or voting, stock. Shares held by nonworkers are called Class "B," and are nonvoting. When the employment of a shareholder-worker ends, his share converts from Class "A" to "B" unless and until sold to an active employee. Such sales are contingent upon the approval of the board, which must satisfy itself that the prospective shareholder-worker is of good moral character and a competent worker. To this end, each "prospective" must submit to a background check by Pinkerton's, Inc., and works as a nonshareholder for a 1-month "trial period." Should a prospective fail on either score, the sale is disapproved and his employment ends.

Respondent itself has acquired a number of shares from departing shareholder-workers in recent years, as a means of controlling work-force size in the face of automation. There were 61 "treasury shares" at the time of trial.

Shares ranged in value from $25,000 to $50,000 in the year preceding trial. Respondent had about 335 shareholder-workers at relevant times.

The complement of production and maintenance shareholder-workers has been augmented over the years by nonshareholder employees, working alongside and interchangeably with the shareholders. The nonshareholder complement generally fluctuated between 30 and 70 in the 15 or so years up to June 14, 1976, although it was as low as 2 or 3 on at least one occasion, in 1971. There were 76 nonshareholders as of June 14, apparently an all-time high, of whom 4 were prospective shareholders in their trial periods. The central issue in this proceeding concerns the June 14 mass discharge of 72 of those 76, the prospectives having been spared. With the possible exception of prospectives, Respondent has had no nonshareholder production and maintenance employees since.

The employment of nonshareholders had been a matter of some controversy among Respondent's directors, past and present, and among the shareholders generally. Plant Superintendent Grenier testified that it had been "talked about" at least since 1963; Secretary Rumsey testified that Director Stroup had been "lobbying" for an all-shareholder complement since 1971 or 1972; and Director Huttula testified that he had "pushed hard" to eliminate all nonshareholders since 1974. The view of Stroup and Huttula long had been held by President McChesney, as well.

The ostensible basis for the opposition to nonshareholders has been the assumption universal among cooperatives in the industry that, on the whole, they are significantly

less productive than the shareholders, who have the incentives of ownership. The assumption has been translated by Respondent and other cooperatives into "weighting" the work time of shareholders as 30 percent more productive than that of nonshareholders for certain tax purposes —a practice that seems to have Internal Revenue Service acceptance in principle, although the degree of weighting has been the target of IRS challenge from time to time.

The organizational onset. Organizational stirrings among the nonshareholders began on about June 1, 1976, apparently induced by the directors' May 26 decision to withhold an expected 65-cent-per-hour wage increase. Respondent customarily had timed nonshareholder raises to coincide with those at union plants in the industry, which occurred June 1. The directors previously had voted monthly raises for the office manager and nonmanagement office personnel of $70 and $45, respectively, to be effective June 1.

First contact with the Union was made by nonshareholder Bryan Ross, after which an organizational meeting was held June 9 at a Vancouver restaurant. The meeting was attended by 17 nonshareholders and 3 union officials. Union authorization cards were distributed for signing and for circulation among the absent nonshareholders. Sixteen signed cards at the meeting. The number grew to 41 by June 16, some having signed after being discharged.

By letter of June 14, the Union declared that it had achieved a majority and demanded recognition in an all-employee unit of Respondent's employees. By a second letter, dated June 16, the Union clarified the demand unit

by saying it did not include shareholders. Respondent refused the Union's demand by letter of June 15. The Union's June 14 letter also demanded reinstatement of the nonshareholders discharged that day.

B. *The Alleged Independent Violations of Section 8(a)(1)*

1. Paragraphs 7(a) and 9

Paragraphs 7(a) and 9 of the complaint allege that, on about June 11, 1976, "Respondent told nonshareholder employees they would have to start breaking in shareholders in case nonshareholders 'go union on us,' " thereby violating Section 8(a)(1).

The evidence. Nonshareholder Jerry Dircksen credibly testified that, at about 7 a.m. on June 14, at the end of the "graveyard" shift, he asked Grenier and Walt Marugg, a foreman stipulated to be a supervisor, if he could be switched from graveyard to swing shift. Grenier replied that he did not "see any problem with that," whereupon Marugg interjected that Respondent had better start "breaking in" the new shareholders "in case these f---ers go union on us." With that, Grenier stated: "If they do, we'll just shut down."

Marugg did not testify, and Grenier's testimony did not address itself to this incident.

Conclusion. It is concluded that Marugg and Grenier violated Section 8(a)(1) substantially as alleged by raising the prospect of nonshareholders being replaced by shareholders and of a shutdown should the Union get in.

2. Paragraphs 7(b), 7(d), and 9

Paragraphs 7(b), 7(d), and 9 of the complaint allege generally that, between June 9 and 14, 1976, Respondent interrogated and threatened nonshareholders concerning their union activities, thereby violating Section 8(a)(1).

The evidence. Nonshareholder John Sauter credibly testified that, during a break sometime between June 8 and 10, Harbie Diener, a foreman stipulated to be a supervisor, asked him if he had "signed up for the Union." Diener did not testify.

Nonshareholder David Kuhn testified that, during a break on June 13, he and Ronald Reibel, a director, had a conversation in which Reibel asked him what was "going on with the Union," what "went on" at the June 9 organizational meeting, and "who was behind" the union activity. Reibel, in his testimony, denied that this occurred. Kuhn is credited. He was much the more forthright of the two, Reibel's testimony being flawed by recurrent evasion and inconsistency.

The General Counsel, in addition, cites certain alleged remarks of shareholders Clarence Finnegan, Robert Lycksell, Dan Stump, Harold Thompson, Red Wallum, and Fred Williamson as within the scope of paragraphs 7(b), (7d), and 9, the contention being that their shareholder status made their conduct binding on Respondent.

Conclusion. It is concluded that, by their conduct just described, Diener and Reibel violated Section 8(a)(1) substantially as alleged.[1] It is further concluded, however, that

[1]In view of the control exercised by the board of directors over Respondent's affairs and the limited number of directors, it is concluded that Reibel, as one of them, was an agent of Respondent at relevant times.

the conduct of mere shareholders cannot be attributed to Respondent; and, therefore, that Finnegan, Lycksell, Stump, Thompson, Wallum, and Williamson did not violate the Act, whatever they may have said.[2]

3. Paragraphs 7(c) and 9

Paragraphs 7(c) and 9 of the complaint allege that, on about June 14, 1976, "Respondent told nonshareholder employees, in response to inquiries regarding their termination that 'you guys asked for it' and 'you guys screwed yourselves' and 'you were fired for that union stuff,'" thereby violating Section 8(a)(1).

The evidence. Nonshareholder Steven York credibly testified that, during a telephone conversation on June 14 in which Foreman Harbie Diener told him of the mass discharge, Diener at first gave "lack of work" as the reason, only to state in the face of York's skepticism: "Well, you know, it was that union stuff."

Nonshareholders David Kuhn, Bryan Ross, and Donald Tooley credibly testified that, in a Vancouver tavern on the afternoon of June 14, Foreman Walt Marugg stated, when asked his reaction to the mass discharge: "You guys asked for it; you just screwed yourselves," or words to that effect.[3]

[2]Finnegan sometimes worked as a ticket man or stock rustler, a position arguably possessing supervisory indicia. The record is too inconclusive concerning when Finnegan so served and the content of that role, however, to permit such a finding as concerns him when he engaged in the conduct in question. Moreover, during the next to last day of trial, the General Counsel voiced the position that "the ticket men are not supervisors."

[3]Counsel stipulated that another nonshareholder, Dan Robertson, would have testified consistently with Kuhn, Ross, and Tooley if called.

As earlier mentioned, neither Diener nor Marugg testified.

Conclusion. It is concluded that Diener and Marugg, by explicitly or implicitly linking the discharges to the nonshareholders' union activities, violated Section 8(a)(1) substantially as alleged.[4]

C. The Alleged Violation of Section 8(a)(3) and (1)

1. The evidence

The nonshareholder buildup. Of the 72 nonshareholders discharged June 14, 41 were on the payroll at the close of 1975. Seven of the remaining 31 were hired in January and February 1976, 22 in March and April, and 2 in June. The influx in March and April was largely Grenier's idea, supported by Mill and having at least the tacit blessing of the board. It was prompted mainly by a disproportionate increase in production at the glue spreaders, which created a need for more manpower at other stages of production, especially in the repatch department, to restore plant "balance." Among other things, a graveyard shift was added in repatch, accounting for the hire of about 15. Other reasons for the hiring upsurge were a chronic absenteeism problem and a spate of retirements and deaths.

As balance improved in April and May, some of the newly-hired nonshareholders were shifted from their original tasks, but none was discharged. Mill testified of the possibility of their being needed "indefinitely," adding: "[T]hey were only hired until that surplus of inventory was worked down, but I had no idea how long it would take." Similarly, Grenier testified that they were hired as "permanent, full-time employees."

[4]Regardless of the legality of the mass discharge, it is no defense that the nonshareholders to whom Diener's and Marugg's remarks were addressed had been previously discharged. As stated in *Little Rock Crate & Basket Co.*, 227 NLRB No. 192 (1977), at slip op. 3, each dischargee "remained a statutory 'employee' within the meaning of Section 2(3) of the Act, as the Board has long held that the term means 'members of the working class generally,' including 'former employees of a particular employer.' "

The discharge decision. The decision to discharge the nonshareholders was made during a special meeting of the directors on June 14, a Monday. It was implemented at 3 p.m. that same day, at the end of the day shift. Implementation coincided with neither the end of a pay period nor the end of a workweek.[5] The meeting began at 7 a.m. and adjourned at about 12:45 p.m. All seven directors participated, along with Mill and Grenier.

Four of the directors testified about the meeting—McChesney, Rumsey, Huttula, and Reibel—as did Mill and Grenier. The consensus is that Rumsey called it; that it was solely his idea; and that Grenier and perhaps Mill were not present at the very start. Rumsey testified that his reasons for calling the meeting were Respondent's worsening economic situation, his belief that too many nonshareholders were on the payroll, and his concern that the directors were "out of touch" because some had been to an American Plywood Association ("APA") convention part of the previous week. These matters could not wait until the next regular board meeting, scheduled for June 17, according to Rumsey, because that meeting already had an agenda that would consume 10 or 12 hours. Regarding the starting time,

[5]Respondent's pay periods end on the 1st and 15th of each month, and the workweek begins at 11 p.m. on Sunday, with the graveyard shift.

Rumsey testified that he selected 7 a.m. because that was change time from graveyard to day shift and one of the directors, Huttula, worked graveyard. The minutes of the special board meetings in 1975 and 1976 reveal that 7 a.m. was a common starting time.

Rumsey testified that, while notice of special meetings sometimes is written, "it was all verbal" as concerns the June 14 meeting because he wanted firsthand assurance that each director received actual notice. He stated at one point that he told each of the directors, incidental to giving notice, that the purpose of the meeting would be "to discuss production problems and to discuss problems throughout the mill," and at another: "I don't remember telling any director what was going to take place."

McChesney testified that he learned of the meeting Sunday night, June 13, at about 9:30, when Rumsey telephoned him at his home. Rumsey did not intimate what the meeting was to be about, according to McChesney, and McChesney did not ask. Although he could not recall its ever having happened before, McChesney assertedly saw nothing unusual in being called at home at that hour for that purpose. He explained that he had returned just that evening from a several-day business trip to Washington, D. C.

Huttula testified that Rumsey called him at home on Friday, June 11, to announce the meeting, and that nothing was said about its purpose. Reibel recalled that he received notice Saturday evening, June 12, when Rumsey called him at home that there would be an "emergency meeting" concerning "economic conditions in the mill." Later, prompted by Respondent's counsel, Reibel revised his testimony to

aver that Rumsey did not use the term "emergency"; rather, that this was Reibel's term because he deems every special meeting to be "abnormal." And, despite his testimony that Rumsey had said the meeting was to deal with "economic conditions in the mill," Reibel later stated that he had "no idea" of the meeting's purpose when it began.

Mill initially testified that the meeting "was very sudden"; that he learned of it perhaps the day before. He later declared that he received written notice from Rumsey's secretary the Friday before; but that, since the notice failed to specify a date, he subsequently obtained that information from Rumsey. Mill stated that he could not recall Rumsey's telling him what the meeting was to involve. Grenier testified that he was first told of the meeting at about 7:30 a.m. on the 14th—i.e., after it had begun—when Rumsey summoned him; and that he had no hint of its purpose until he got there—"it was on the spur of the moment, and I didn't know what was coming on." Grenier usually gets advance notice of board meetings.

Concerning the meeting itself, McChesney testified that he had no idea of its purpose even as he called it to order. He continued that, after giving a "quick rundown" of his trip to Washington, D. C., he asked Rumsey why they had been assembled; and that Rumsey replied that he was worried about "the market conditions and the declining market" and urged that they explore ways "of overcoming the problems that might be foreseen in this declining market." A general discussion ensued, according to McChesney, in which the market situation and Respondent's efficiency in

terms of man-hour footage were examined,[6] and comments were made about the superior productivity of shareholder-workers *vis-a-vis* nonshareholders and about nonshareholder absenteeism. McChesney related that the directors considered cutting the shareholders' hourly rate of advance to meet the problem;[7] then, after two unsuccessful motions to trim the number of nonshareholders, it was moved, seconded, and passed that they be eliminated altogether; after which the meeting promptly adjourned.

McChesney testified that the concern over the market derived from Crow's Plywood Letter, a periodical that issues each Friday and is received by Respondent each Monday, which is a purveyor of price guidelines in the industry. McChesney could not recall, however, "that we actually would have Crow's Letter there [at the meeting] at that time." And, although stating that man-hour production was discussed and that sheets are maintained reflecting man-hour footage, he had no memory that such sheets were used during the meeting, or if graphs, charts, digests, or papers of any kind were used in aid of the directors' evaluation. Nor could he remember if specific plywood prices were mentioned. If they were, he was certain that Mill, as sales manager, would have been the one to do so.

Other than recalling his own mention of having seen a report in Washington the previous week to the effect that shareholders are 30 percent more productive than nonshareholders, McChesney's memory also failed him con-

[6]Man-hour footage was defined on the record as "the average number of square feet of plywood produced per man per hour."

[7]During the course of the year, shareholders receive advances against year-end earnings on an hourly basis, in lieu of wages. The hourly rate of advance in June 1976 was $7.

cerning what was said on that subject; as it did whether the absenteeism of nonshareholders was compared with that of shareholders. Similarly, while recalling that both Mill and Grenier offered "substantial input" during the meeting, and although conceding that he trusts Mill's judgment "absolutely" and that Grenier was the "most knowledgeable" person there in terms of Respondent's manpower needs, McChesney could not recall if they made any specific recommendations or even if they were called upon to do so. Additionally, apart from generalizing that "the majority [of the directors] felt that the shareholders could produce . . . efficiently enough to at least hold the same man-hour production or increase the man-hour production," he "couldn't say what any one director might have said in the meeting."

McChesney testified that he had no knowledge of the nonshareholders' union activities when the discharge decision was made, yet related that one of the directors—he could not remember who—"mentioned that they had heard rumors about a [union] meeting" and that the nonshareholders were "forming a bargaining unit." He stated that that they were "well into the meeting"—perhaps 1½ hours —when this came up; that it prompted only a "very, very limited discussion"; and that no one evinced particular concern about it. Even so, McChesney professedly saw fit to poll the directors—but not Mill and Grenier—whether any had been contacted by or heard rumor about the Union. All supposedly replied in the negative, apparently including the one who reported the rumor in the first place.

McChesney termed the poll "a minor thing," but nevertheless something to be pursued before the directors took any action—"I thought that it might be an issue in what kind of decision we might make at that time." McChesney "would have wanted to put my decision off for a week or so to find out just exactly if we could go ahead and terminate" if the poll had disclosed that "they were organizing in some way."

Although he long had favored an all-shareholder work force, the idea of terminating the nonshareholders in toto never occurred to McChesney "as an active possibility" until the June 14 meeting, and her reputedly voted in support of that action only because of "a price falloff of a few weeks" as revealed by Crow's. Despite his claimed reliance upon Crow's, he admittedly has no knowledge "as to what extent" Respondent's prices follow Crow's figures, instead relying "on the decision, or on the information that the general manager [Mill] would pass on to me." As will be seen, Mill not only opposed total elimination of the nonshareholders, but testified that "a large part of our orders is not related to Crow at all." As also will be seen, Crow's Plywood Letters of June 4 and 11 did not depict a landscape of unrelieved bleakness.

McChesney "assumed" nonshareholder absenteeism to be an added factor in the June 14 decision, even though he had no recall of its being compared with that of shareholders and even though, by his own admission, there was "quite a bit of absenteeism" among the shareholders both before and after June 14.[8]

[8]The minutes of the directors' meeting of September 16, 1976—some 3 months after the nonshareholders were discharged—reflect Grenier's complaint of "too much absence throughout the mill."

Asked about his inability to reconstruct the June 14 meeting in any detail, McChesney testified:

> It's a round-table discussion . . . . [I]n our round-table discussions, it's hard to remember if anybody's made a specific recommendation. We all discuss things. It's very, very loose. Nobody has the floor at any one time, necessarily. Other people interrupt. It's hard to say what any one man did. At the end of a long discussion, we will make a decision; and, then we move on.

Rumsey testified that his theme-setting remarks at the meeting were that things "had gone to hell in a handbasket in a hurry"; that log costs were going up and the plywood market had been declining for several weeks. The basis for his alarm, he testified, was Crow's Plywood Letter, but he could not recall if he "specifically pulled out" any issues of Crow's while pressing his point. He assertedly mentioned, as well, that nonshareholder absenteeism "was pretty doggone bad" and getting worse, although citing no figures. He had no idea before the meeting that absenteeism would be discussed, yet claims to have laid "the folder on that" on the table in front of him for the others to review.

The superior productivity of shareholders was "bantered about," according to Rumsey, but he could not remember what was said; someone observed that the shareholders had fewer rejects; and Swanson talked of the misuse of veneer. Rumsey recalled Huttula's asking Grenier why man-hour footage was slipping, but could not remember the answer. His memory likewise failed him whether Grenier was asked how many nonshareholders he thought should be retained, and whether Mill was asked any questions of that sort. Indeed, while admitting that it is "customary"

for the directors to solicit the opinions of Mill and Grenier in their areas of expertise, and conceding that he trusted their judgment "in most respects," Rumsey stated that he could not remember anything that was asked of either, or anything that either said.

Rumsey did recall that, "right toward the end" of the meeting, three motions were made, two to trim the number of nonshareholders and a third to eliminate them altogether; that the third prevailed; and that the meeting then adjourned. Rumsey claims to have opposed the successful motion, instead favoring the immediate reduction of the nonshareholder complement to about 30, then "slowly work the 30 out" over 30 to 40 days. He testified that he did not foresee the meeting's outcome when he called it—"I had no idea how it was going to go"—and first realized that a large-scale discharge was a possibility at the end, coincident with the motions.

Rumsey testified that he was ignorant of union activity at the time of the meeting, only to grant that he "may have" heard "rumors" in the preceding week. If he did hear rumors, he stated, he disregarded them—"I close my ears when rumors start humming." Rumsey could not remember any mention of union activity during the meeting, or that McChesney conduct a poll on the subject. He was "in and out" as the meeting progressed, estimating that he missed 30 minutes in all.

After once testifying that a mass discharge of such proportions entailed no "soul searching" inasmuch as "we had very few who had that much longevity or were that skilled at their particular jobs," Rumsey acknowledged that

"definite soul searching" was required. Even so, and despite his alleged concern that things "had gone to hell in a handbasket in a hurry," he professed that the June 14 meeting was no more important than any other, and that some are "much more important."

Rumsey testified, in attempted explanation of his poor recall of the meeting: "I attend so many meetings that one meeting runs right into another quite frequently." He added, following McChesney's lead:

> It's a round-table discussion, and I don't know who asked what questions. I know what topics pretty much were hit upon, but as far as an individual speaking, I have no recollection.

Huttula testified that Rumsey's opening remarks were to this effect:

> We're going to have to look at ourselves as far as our market condition, as far as our efficiency, and as far as what we can do to better our position with our high cost of log[s] coming in.

A "good share of the time" after that was devoted to market conditions, according to Huttula, during which he "kicked a lot of numbers out" dealing with prospective gains and losses, using Crow's Plywood Letter and Random Lengths, another industry periodical, as sources. Mill was called upon "to verify" market conditions, Huttula recalled, but he could not remember what Mill said. Nor could he recall if Mill was asked his view of the feasibility of discharging some or all of the nonshareholders. Huttula remembered himself asking Grenier if he could run the plant without nonshareholders, and that Grenier said he could.

Sometime during the meeting, according to Huttula, someone expressed concern that the discharge of nonshareholders at that time might be linked to the union activity. He could not recall who raised this, or if it came up before or after the decision had been made. It was not, in Huttula's view, "the important issue" of the meeting. Also unrecalled was the McChesney poll. Huttula testified at one point that he "felt" before June 14 that union activity was afoot—"you hear talk." He averred elsewhere, however, that he had heard nothing about it before the discharge decision.

Huttula voted for the elimination of all the nonshareholders, explaining that he had always espoused an all-shareholder complement. Despite his assertion that Rumsey had given him no inkling of the meeting's purpose, Huttula testified that he anticipated at its start that some or all of the nonshareholders would be discharged.

Reibel testified that the focus of the meeting was the declining plywood market and "ways to improve the profit picture." He recalled himself making the observations that the nonshareholders were "quiet, aloof, and shady"; that they had been "very quiet in the past month"; and that he had noticed those on the "green end"—i.e., the first floor, as Respondent's plant is laid out—talking with those on the second floor. Much later, and after testifying extensively of using the word "shady," Reibel denied that he had thus described the nonshareholders.

Grenier was asked if he could run the plant with a "reduced work force," according to Reibel, and said he could. Reibel could not remember any question to or response by

Mill, nor could he recall specific statements made by any director other than himself. He testified that he had heard no rumors of union activity before the meeting, that none was reported during the meeting, and that there was no poll by McChesney. Reibel voted that all nonshareholders be discharged, his claimed reasons being that shareholders "produce better because they own the company" and that he preferred that to having his hourly rate of advance cut as had happened once before.[9]

Mill's version of the meeting was that a discussion started "immediately" whether to "continue running like we were" or to adopt a "cut-out-the-fat approach" consisting of discharging some or all of the nonshareholders. Mill testified that he gave a "verbal, up-to-date report" in which log costs were "projected to go up" in the face of a "down market." He testified elsewhere that rising log costs had been a fact of life for many years, and that Respondent therefore had "anticipated" that aspect of its June 1976 situation. He assertedly did not venture "how far it [the market] will go down, or how long it will last." During the regular board meeting 3 days later, however, he stated, as reflected by the minutes:

> It is hard to say what the market will do from this point on, but hopefully it will bottom out sometime in the near future without going much lower than the current list.

Mill "pointed out" on June 14, as he recalled, that man-hour production "had slipped" in the preceding 4 months

[9] Shortly after Reibel became a shareholder in 1974, the shareholders' hourly rate of advance was cut from $7 to $5, allegedly because of economic duress.

and that the reject percentage was up. He remembered being asked the effect of laying off some or all of the nonshareholders, and answering that production likely, but not inevitably, would decrease. He was not sure the same question was put to Grenier. He claimed to have mentioned the availability of a manning chart allegedly prepared by Grenier a week or two before on the supposition that there were no nonshareholders, but had no recall of its being brought to the meeting.

Mill related that both he and Grenier recommended dismissal of only one-half of the nonshareholders; and that Rumsey and Swanson joined in that view while the others wanted to discharge all. Explaining his recommendation, Mill testified of believing that was "all the 'fat' there was." At another point in his testimony, Mill stated that, while he would "assume" that there was some fat on the payroll on June 13—the day before—he "couldn't put my finger on any spot where there was."

Except as above set forth, Mill could not "remember the specifics at all" of the meeting, just the "general discussion"—"it was a year ago, and I don't remember the exact words I said or what anybody else said, really." He could not recall the McChesney poll, and avowedly first learned of the union activity a day or two later. If union activity was mentioned in the meeting, he contended, "it never stuck—it wasn't that significant."

Grenier testified that he was called to the meeting shortly after it had begun; and that, before he could sit down, he heard Huttula urge, with the concurrence of McChesney and Stroup, that there be an all-shareholder complement.

Rumsey espoused a "gradual phase-out" of nonshareholders, according to Grenier, and commented that there was "too much absenteeism." Huttula spoke of veneer wastage by the nonshareholders, Grenier related; and Grenier himself claimed to have observed that efficiency had been "dropping off slowly . . . for a couple of weeks" before the meeting. Otherwise, Grenier could remember nothing said about efficiency.

Grenier assertedly could not recall if Mill made any statements in the meeting, or if there were any remarks about man-hour footage, or if anyone commented about union activity. Grenier admittedly took no papers or reports to the meeting, nor did he do anything to prepare himself for it—"I didn't know why the meeting was called." Although some of the nonshareholders were better employees than some of the shareholders in Grenier's judgment, he testified that no consideration was given to selecting people from both categories for discharge to meet the purported crisis.

The record contains yet another rendition of the June 14 meeting—Rumsey's minutes. The minutes, on their face, are grossly incomplete. As McChesney noted: "We don't put everything in the minutes, even though we might discuss and be concerned with it." Further in that vein, Rumsey indicated that the minutes, generally, do not necessarily embody the full essence of the meetings they concern. Rumsey elaborated that, if the board told Grenier in a given meeting that there was too much "fat" on the payroll, this would not necessarily be captured in the minutes; and that, if the Union's demand letter was discussed in the

June 17 regular meeting, the minutes would not necessarily show that.[10]

The June 14 minutes:

Fort Vancouver Plywood Company
Minutes of Special Board of Directors Meeting
June 14, 1976

Meeting #24-76

The meeting was called to order at 7:00 A.M. by the President, Jerry McChesney. All Directors were present. This constituted a quorum. Also present was General Manager, Roland Mill and Superintendent, Richard Grenier, Jr.

1. *MILL OPERATIONS:* The Directors, management and superintendent reviewed current market conditions, man-hour footage, employee efficiency, veneer usage, and absenteeism of non-shareholder employees. It was noted that greater productivity and efficiency was provided by shareholder employees due to the incentive of ownership and direct profit participation. Also noted was the fact that the company has been purchasing its own shares to reduce the maximum number of shareholder employees.

2. *WORK FORCE REDUCTION:*

MOTION MADE BY STANLEY SWANSON THAT DUE TO CURRENT MARKET CONDITIONS AND OTHER ECONOMIC CONSIDERATIONS, MANAGEMENT AND SUPERVISION BE DIRECTED TO CUR-

[10]Indeed, while it is next to inconceivable that the Union's demand did not come up during the June 17 meeting, the minutes are totally silent on the subject.

TAIL EMPLOYMENT OF NON-SHAREHOLDER EMPLOYEES AS MUCH AS POSSIBLE.

Motion failed for lack of a second.

3. *WORK FORCE REDUCTIONS:*

MOTION MADE BY STANLEY SWANSON, SECONDED BY LYNDON RUMSEY, THAT DUE TO CURRENT MARKET CONDITIONS AND OTHER ECONOMIC CONSIDERATIONS MANAGEMENT AND SUPERVISION BE DIRECTED TO CURTAIL EMPLOYMENT OF NON-SHAREHOLDER EMPLOYEES TO A MAXIMUM OF THIRTY (30) INDIVIDUALS.

Voting for the Motion: Stanley Swanson and Lyndon Rumsey.

Voting against the Motion: Jerry McChesney, Walt Huttula, Charles Wright, Ron Reibel and Melford Stroup.

Motion failed.

4. *WORK FORCE REDUCTION:*

MOTION MADE BY MELFORD STROUP, SECONDED BY RON REIBEL THAT DUE TO CURRENT MARKET CONDITIONS AND OTHER ECONOMIC CONSIDERATIONS, MANAGEMENT AND SUPERVISION BE DIRECTED TO IMMEDIATELY TERMINATE THE EMPLOYMENT OF ALL NON-SHAREHOLDER PRODUCTION EMPLOYEES.

Voting for the Motion: Jerry McChesney, Walt Huttula, Charles Wright, Ron Reibel and Melford Stroup.

Voting against the Motion: Stanley Swanson and Lyndon Rumsey.

Motion carried.

5. *ADJOURNMENT:*

MOTION MADE BY STANLEY SWANSON, SECONDED BY WALT HUTTULA AND UNANIMOUSLY PASSED TO ADJOURN THE MEETING.

Meeting adjourned at 12:45 p.m.

/s/ Gerald R. McChesney

Jerry McChesney, President

/s/ Lyndon Rumsey

Lyndon Rumsey, Secretary

Cost of Meeting: $240.00

Cost of Meetings to date: $5,526.25

At the close of the meeting, McChesney directed Grenier to pass the word to the nonshareholders that they had been discharged "due to economic considerations," after which this notice was posted over Rumsey's name:

NOTICE

THIS IS TO INFORM EACH SHAREHOLDER-WORKER THAT THE BOARD OF DIRECTORS HAS INSTRUCTED MANAGEMENT AND SUPERVISION TO TERMINATE THE EMPLOYMENT OF *ALL* NON-SHAREHOLDER EMPLOYEES.

YOUR COOPERATION AND SUPPORT IS REQUESTED AND IS NECESSARY FOR THE TRANSITION TO A FULL SHAREHOLDER-WORK FORCE.

The elimination of the nonshareholders dictated various adjustments. Jobs were consolidated, some shifts for some jobs were struck, crew sizes in some instances were reduced, hours were increased, automation was stepped up, and, in Rumsey's words, "people pulled together a little harder." The result, according to Mill, was a drop in production accompanied by an increase in production per man-hour.

Respondent apparently was suffering from a manpower shortage, undoubtedly caused in large part by the discharge of the nonshareholders, at least as late as the shareholders' annual meeting in November 1976. The minutes of that meeting reveal that Mill spoke of a need for "more automation to solve our manpower problems," and of the necessity that Respondent supplement its own veneer production from outside sources "to be able to maintain anywhere near the spreader production balance that we need . . . with our own limited amount of men."

Other indications of Respondent's economic health and prospects. Aside from the assorted alarmist comments allegedly made in the June 14 meeting, the record affords an abundant base for objective insight into Respondent's condition and prospects at and around that time.

Respondent's fiscal and production year runs from July 1 through June 30. The year ending June 30, 1976—i.e., 16 days after the mass discharge—was, in McChesney's words, "the best year of production that we had." The accountant's report for that year discloses, moreover, that sales and net earnings exceeded the previous year's by $4,466,508 and $268,950, respectively. Beyond that, Grenier reported at the shareholders' annual meeting in November 1976, as revealed by the minutes, that man-hour production in the

fiscal years ending in 1975 and 1976 was at "a record high," and McChesney reported at the same meeting:

> Fort Vancouver Plywood's 1976 fiscal year has been another good one for all shareholders. It wasn't as profitable as some years we have had, but a lot better than most.

The minutes of the directors' regular meetings in the fiscal year ending June 30, 1976, in setting forth Mill's monthly reports, indicate that the market did decline starting in February or March 1976 as concerns 5-ply—which evidently is a bellweather since it was the only price citation made by Mill at each meeting. But even so, the level as of June 17, 1976, exceeded the levels of 5 of the 12 months in that eminently successful year. Thus:

7/17/75	$108	1/15/76	$140
8/21/75	106	2/19/76	148
9/18/75	114	3/18/76	144
10/16/75	106	4/15/76	144
11/20/75	116-118	5/26/76	138
12/18/75	130	6/17/76	122

During the last regular directors' meeting before June 14, on May 26, Mill addressed himself to the declining market by reading from a report that stated:

> [M]ost respondents expect a sideways or a further deteriorating market for the next two to five weeks. A good number expect an uptick in June, citing vacation shutdowns in July and slowly improving true demand. Practically no one predicts a market collapse.[11]

In the same meeting, Grenier reported variously that "production is looking good," that the spreader crews "are

[11]Asked on cross-examination to define "uptick," Rumsey said it means "a slight jump, possibly."

doing a better job *in keeping the reject percentage down*" emphasis added), that the repatch department "is in good shape now," that the green end "is in good shape," and that "we should have a good month shipping."[12]

Concerning the industry generally, Crow's Plywood Letter of June 4, 1976, stated that the sanded plywood market "is wallowing as helpless as a dismasted schooner," but that "sheathing apparently bottomed out and is gaining a few points . . . ."[13] Continuing with reference to the sanded market, the letter noted that the situation was common to the time of year:

> It's the same old story. Only once in the 18-year history of this letter has the market been liveable at APA meeting time. That was 1973.

Crow's letter of June 11, presumably received by Respondent June 14, already was singing a happier song:

> As so often happens at the trailing off of an APA annual meeting, the panel markets bottom out (they're usually softening as the meeting begins) and start to turn around. This APA meeting was no different.

The June 11 letter also summarized a speech made at the APA convention by Bronson J. Lewis, APA executive vice president, in which Lewis reportedly spoke of "many bright

[12]As earlier mentioned, Rumsey testified that he trusted the judgment of Mill and Grenier "in most respects." When faced on cross-examination with their optimistic reports as reflected by the minutes of the regular meetings before June 14, however, he testified that he "wasn't in agreement with their reports that said everything was running smoothly."

[13]Mill and McChesney both testified that, when some segments of the plywood market are more favorable than others, Respondent tailors its production accordingly. As McChesney put it, Respondent will "go where the market is."

spots" in the plywood market, predicted that 1976 production "will look awfully good" compared to 1974 and 1975, and raised the possibility of a record market demand in 1977 "helped by increased home building."

Some alleged happenings before June 14. A week or so before June 14, according to both Mill and Grenier, Mill directed that Grenier prepare a manning chart on the basis of an all-shareholder complement. Explaining, Mill testified that he thought it "very likely" that the directors would want to discharge all the nonshareholders because of the market situation. Mill could not cite any conversation with a director that gave him this feeling, although he did not rule out that having happened. Grenier testified, on the other hand, that Mill mentioned a conversation with Huttula while directing that the chart be prepared. It was this chart that Mill claimed to have mentioned at the June 14 meeting, although unable to recall if it was physically present.

Grenier reputedly became convinced, while preparing the chart, that an all-shareholder force was "a darn good idea." He testified that he discussed the chart with Mill only when he turned it in, and then "just briefly," but that Mill likewise was persuaded that an all-shareholder complement was "a good idea." Even so, Grenier continued, he and Mill took no action, nor did they proffer copies of the chart to any of the directors—"it was just strictly between Roland and myself." According to McChesney, Grenier possessed the authority to discharge all the nonshareholders without board clearance.

Mill's testimony does not reinforce Grenier that either of them believed an all-shareholder force to be a good idea. Mill, it will be remembered, testified that he and Grenier recommended dismissal of only one-half of the nonshareholders on June 14; and that he "couldn't put my finger on any spot where there was" fat as of June 13. Mill further testified that a disturbing aspect of the mass discharge was the loss from the glue spreader crews of "very experienced" nonshareholders inasmuch as those positions demand from 6 months to 2 years of training.

Rumsey testified that he told Grenier on about June 1 that, if Grenier did not bring the nonshareholder level back to 30, Rumsey intended to make an issue of it at a board meeting, and that Grenier expressed opposition because Respondent was "still behind in repatch" and vacations were coming up. Grenier had no recall of such a conversation, instead testifying that, during a regular board meeting, "probably" in March Rumsey spoke of reducing the nonshareholder level to 30; and that Grenier responded: "[W]e can phase out some of them; I don't know if we could phase out all 35 of them at that time." Rumsey could not recall a board meeting before June 14 in which that issue was raised, although he assertedly had concluded "several months" earlier that something had to be done.

McChesney testified that, "at various times" in the several months before June 14, he engaged in "off-the-cuff type conversations" with his fellow directors about the number of nonshareholders "that we were getting," but that no one suggested board intervention to reverse the trend. Grenier testified that, in February and March 1976,

Huttula discussed with him "several times" the desirability of operating exclusively with shareholders.

2. Conclusion

It is concluded that the mass discharge was motivated largely by antiunion considerations, and therefore violated Section 8(a)(3) and (1) as alleged.[14] All of the elements indicative of improper motivation are convincingly present. Thus:

Timing. Although certain of the directors assertedly had desired the elimination of the nonshareholders for years, the action followed by just a few days the advent of the organizational activity, and by just a few months an unprecedented expansion of the nonshareholder complement. In addition, the decisive board meeting was "very sudden" in Mill's words, or "on the spur of the moment," to quote Grenier. Yet, of the two economic factors supposedly dictating Respondent's action, Mill admitted that log costs had been on an anticipated upward spiral for years and Crow's Plywood Letters of June 4 and 11 reveal that the market situation was common to that time of year. That leaves only the unforeseen emergence of union activities to explain the hurriedly-called meeting.

[14]Respondent contended during the trial that three of those included in the mass discharge—Maynard Azure, Parker Rogers, and Verne Wood—were supervisors, a position it seemingly abandons in its brief as concerns Azure. Assuming without deciding that one or all were supervisors, their discharges nevertheless violated Section 8(a)(1) because "motivated by a desire to discourage union activities in general among the employees" rather than by a concern that they, as asserted supervisors, had abetted the organizational drive. *Heck's, Inc.*, 170 NLRB 178, 184 fn. 8 (1968). See, also, *General Nutrition Center*, 221 NLRB 850, 858-59 (1975); *Fairview Nursing Home*, 202 NLRB 318 fn. 2 (1973); *Krebs and King Toyota, Inc.*, 197 NLRB 462, 463 fn. 4 (1972); *Pioneer Drilling Co.*, 162 NLRB 918, 923 (1967).

Knowledge. Respondent knew of the nonshareholders' union activities before the decision was made, as witness the pre-decision violations of Section 8(a)(1) by Reibel, Grenier, Marugg, and Diener, and the admissions of McChesney and Huttula that the subject arose during the June 14 meeting. Knowledge also was suggested by Reibel's remarks during that meeting that the nonshareholders were "quiet, aloof, and shady," that they had been "very quiet" in the past month, and that he had noticed them talking between floors—likely references to their union activities, Reibel's denials notwithstanding.

Animus. Marugg's pre-meeting remark that Respondent should start "breaking in" the new shareholders "in case these f---ers go union on us," followed by Grenier's that, "if they do, we'll just shut down," evinced an animus capable of mass discharge; and the remarks of Reibel during the June 14 meeting indicated animus as well as knowledge.

Admissions. The post-discharge explanations of Diener ("it was that union stuff") and Marugg ("you guys asked for it; you just screwed yourselves"), when considered with all the other indicia of improper motivation, in all probability were based on well-grounded information rather than surmise.

Witness unimpressiveness. The claimed inability of Respondent's several witnesses to remember the June 14 meeting in any detail was pandemic and on matters of fundamental importance, indicating that this was part of a grand strategy to bury the truth and avoid those damning discrepancies that inevitably intrude when fabrication of detail is undertaken. But despite this orchestrated amnesia,

their testimony was self- and mutually-impeaching time and time again, and fraught with implausibilities great and small, instances of which were noted or suggested in the summary of their testimony.

The failure of the economic defense. Respondent's economic defense was altogether unpersuasive. As noted above, the two factors supposedly dictating the mass discharge, rising log costs and a down market, were in conformity with predictable and familiar patterns. Beyond that, the objective evidence of Respondent's circumstances and prospects sharply contradicted the hell-in-a-handbasket rhetoric allegedly used by Rumsey and others in the June 14 meeting. Respondent was just concluding "the best year of production that we had," with man-hour production at "a record high" and sales and net earnings ahead of the previous year's by vast sums; and the June 11 Crow's Plywood Letter reported a speech in which the APA's executive vice president predicted that 1976 production "will look awfully good" compared to 1974 and 1975 and spoke of a record market demand in 1977. In addition, Respondent's witnesses were so uniformly abject in their purported reconstructions of the June 14 economic deliberations that they betrayed, beyond slightest doubt, the pretextuousness of the economic defense.

The evidence of Respondent's wrongdoing, in short, is cornucopic. The point, however, has been amply made and needs no further amplification.[15]

[15]In its brief, Respondent relies heavily on the all-shareholder manning chart allegedly prepared by Grenier around June 1, and on Rumsey's allegedly having admonished Grenier at about the same time to reduce the nonshareholder complement, as indicative of lawful motivation. While it is not doubted that Grenier prepared an all-shareholder manning chart, he and Mill are discredited that it was done before June 14, in view of their overall testimonial unreliability and the utter implausibility of the chart's not having been present and consulted at the June 14 meeting if then in existence. Rumsey's alleged admonition to Grenier likewise is discredited. Grenier not only failed to corroborate but contradicted Rumsey's testimony on the point, and Rumsey was a generally unbelievable witness in any event.

D. The Alleged Violation of Section 8(a)(5) and (1)

The General Counsel contends that the Union achieved a card-majority among the nonshareholders, and that that, in combination with the mass discharge and other violations above described, warrants a remedial order that Respondent recognize and bargain with the Union; and, therefore, that Respondent's denial of the Union's recognitional demand violated Section 8(a)(5) and (1).

1. The unit question

Facts. The Union's demand letter of June 14, as clarified by the letter of June 16, in essence defined the unit in which recognition was sought as all of Respondent's nonshareholder employees. The questions thus posed are whether the nonshareholders had a community of interest sufficiently distinct from the shareholders to justify shareholder exclusion from the unit, and whether the four prospective shareholders in their trial periods at relevant times should be in or out.

In addition to working alongside and interchangeably with one another, shareholders and nonshareholders were equally eligible for advancement to supervision, merit being the only criterion; all were equally subject to the disciplinary authority of the plant superintendent, short of discharge; all had the same health and welfare coverage

and the same vacation and holiday entitlement; and all got the same discount when purchasing Respondent's products and at its service station.

Otherwise, there were important differences in their situations. As mentioned before, shareholders receive advances against year-end earnings on an hourly basis, in lieu of wages; and all receive the same rate of advance regardless of duties. The hourly rate was $7 in June 1976. They also receive a year-end "patronage dividend" out of profits in excess of advances, proportionate to hours worked by each. Nonshareholders, on the other hand, received an hourly wage, which varied depending on job classification and shift, the range generally being between $5 and $6 at relevant times. Shareholders and nonshareholders alike participated in a profit-sharing program, but it contained a 30 percent weighting in favor of the shareholders on the theory of superior productivity.

Shareholders enjoyed preference over nonshareholders in job-bidding, and a shareholder doing a given job on a given shift was privileged to exchange shifts with, or "bump," a nonshareholder doing that job on a different shift. The plant superintendent was empowered to hire and fire nonshareholders, but can only recommend the hire and fire of shareholders, final say being the board's. Shareholders, unlike nonshareholders, have never lost their jobs through a reduction in force; and, as this case amply demonstrates, the nonshareholders were subject to en masse discharge, for whatever reason, even though some concededly were better employees than some of the shareholders.

Finally, the right to vote upon, and become a member of, the board of directors was limited to shareholders.

The prospective shareholders, as mentioned before, work as nonshareholders only for the 1-month term of their trial periods, after which they either become shareholders or are terminated. The four prospectives on the payroll on June 14 were not included in the mass discharge; and in fact were converted to shareholders during the regular board meeting on June 17.

Conclusion. It is concluded, based upon the extent of their participation in the management of Respondent, their unique stake in its economic fortunes, and their preferred standing *vis-a-vis* the nonshareholders concerning job tenure and bidding and bumping rights, that the shareholders were a group apart from the nonshareholders for unit purposes under the Act. *Sida of Hawaii,* 191 NLRB 194 (1971); *Brookings Plywood Corporation,* 98 NLRB 794 (1952). It is further concluded that the prospective shareholders, during their trial periods, possessed a community of interest aligning far more closely with the shareholders than the nonshareholders, and so should also be excluded from the unit.

The unit described below, which comports in substance with that defined by the Union in its demand letters, is appropriate under the Act:

> All nonshareholder production and maintenance employees employed by Fort Vancouver Plywood Company in its plant at Vancouver, Washington, excluding all shareholders, prospective shareholders, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The majority question

Facts. Respondent's nonshareholder production and maintenance complement numbered 72, excluding the four prospectives, as of June 14—the date of both the mass discharge and the Union's first demand. Of those 72, 41 signed union authorization cards. The first were signed June 9 and the last June 16. At least six were signed after the discharges, and at least one so signed was backdated to a pre-discharge time.

The parties are in disagreement over the unit status of two signers—Parker Rogers and Verne Wood—Respondent contending that they were supervisors and thus to be excluded.[16] They also are in disagreement over the status of five nonsigners—Arnell Bosh, Ed Haufe, Mike Hyde, Larry Randall, and Ronald Redfearn—the General Counsel contending that their employment was of too casual a nature to permit inclusion.

The cards, all identical, took this form:

International Woodworkers of America

I, ... now employed by.....

..... do hereby make application for membership in the:

INTERNATIONAL WOODWORKERS OF AMERICA, and hereby designate said Union as my bargaining agency

[16]As noted previously, Respondent was of the position during the trial that another signer, Maynard Azure, a ticket man, also was a supervisor. In its brief, however, it makes the argument only with respect to Rogers and Wood.

in all matters pertaining to wages, hours and other conditions of employment.

Signature: .....

.....

Street City State

Date: ....

Phone No.

There is no evidence that any of the cards were represented to any of the signers as being *solely* for some purpose other than that printed on them.

Conclusion. Resolving the unit status of the seven disputed employees in favor of Respondent for purposes of argument,[17] the Union nevertheless had 39 cards in a unit of 70 as of June 16, when it repeated its demand through the letter clarifying the unit description. It thus had a clear card majority. Moreover, there was nothing in the content of the cards or in the manner of their solicitation to invalidate them for recognitional purposes. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 606-07 (1969); *Walgreen Company*, 221 NLRB 1096 (1975); *The Great Atlantic & Pacific Tea Company*, 210 NLRB 593 (1974); *Unarco Industries*, 197 NLRB 489 (1972); *Levi Strauss & Co.*, 172 NLRB 732 (1968); *Cumberland Shoe Corporation*, 144 NLRB 1268 (1963).

[17]But leaving the status of those seven undecided on the merits.

It is concluded, therefore, that the Union had a valid card majority at relevant times.[18]

3. The reliability of the cards as opposed to an election

Respondent perpetrated the most egregious sort of misconduct by its liquidation of the nonshareholder unit; and, in so doing, destroyed any possibility of—and forfeited its right to—an NLRB election as a fair test of employee sentiment concerning union representation. Therefore, since the Union did possess a valid card majority in that appropriate unit, a bargaining-order remedy is necessary and proper to protect the employees' representational rights. Moreover, by refusing the Union's repeated demand for recognition in those circumstances, Respondent violated Section 8(a)(5) and (1). E.g., *The Catalyst,* 230 NLRB No. 54 (1977); *Donn Products, Inc.,* 229 NLRB No. 9 (1977); *Four Winds Industries, Inc.,* 228 NLRB No. 140 (1977); *Hambre Hombre Enterprises,* 228 NLRB No. 18 (1977); *Jimmy Dean Meat Company of Texas,* 227 NLRB No. 161 (1977); *Trading Port, Inc.,* 219 NLRB 298 (1975).

VI. Conclusions of Law

A. By telling a nonshareholder employee that it would have to start "breaking in" the new shareholders in case the nonshareholders "go union on us"; by telling a nonshareholder employee that it would "just shut down" should the Union get in; by interrogating nonshareholder employees whether they had "signed up" with the Union, about what "went on" at a union organizing meeting, and who was

[18]It is of no moment that some of the nonshareholders signed after discharge. Their employee status continued unimpaired in point of law because of the illegality of the discharges. Nor is it of any moment in the circumstances that one or more of the cards was backdated.

"behind" the union activities; by telling nonshareholder employees, with reference to their discharges and their union activities, that they had "asked for it" and had "screwed themselves"; and by telling a nonshareholder employee that the mass discharge of nonshareholders was because of "that union stuff," all as found herein, Respondent in each instance violated Section 8(a)(1) of the Act.

B. By discharging its entire nonshareholder complement on June 14, 1976, as found herein, Respondent violated Section 8(a)(3) and (1) of the Act.

C. By refusing to recognize the Union as the exclusive collective-bargaining representative of its nonshareholder employees in the appropriate production and maintenance unit after June 16, 1976, as found herein, Respondent violated Section 8(a)(5) and (1) of the Act.

D. Respondent did not otherwise violate the Act as alleged.

* * * * *

Upon the foregoing findings of fact, conclusions of law, and the entire record,[19] and pursuant to Section 10(c) of the Act, I hereby issue this recommended:

ORDER[20]

Respondent, Fort Vancouver Plywood Company, its officers, agents, successors, and assigns, shall:

[19]Transcript page 1485, line 14, is corrected to state "WALTER HUTTULA" instead of "HOWARD W. PETERSON."

[20]All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Telling nonshareholder employees that it would have to start "breaking in" the new shareholders in case the nonshareholders "go union on us"; or telling nonshareholder employees that it would "just shut down" should the Union get in; or interrogating nonshareholder employees whether they had "signed up" with the Union, about what "went on" at a union organizing meeting, and who was "behind" the union activities; or telling nonshareholder employees, with reference to their discharges and their union activities, that they had "asked for it" and had "screwed themselves"; or telling nonshareholder employees that their mass discharge was because of "that union stuff."

(b) Discharging or otherwise discriminating against nonshareholders because of the union activities of some or all of them.

(c) Refusing to recognize Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of its nonshareholder employees in the appropriate unit, described below.

(d) In any other manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take this affirmative action:

(a) Upon request, recognize and bargain with Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive representative of all nonshareholder employees in the appropriate unit; and, if an understanding is reached, embody it in a signed document if asked to do so. The appropriate unit is:

> All nonshareholder production and maintenance employees employed by Fort Vancouver Plywood Company in its plant at Vancouver, Washington, excluding all shareholders, prospective shareholders, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Offer to the 72 nonshareholders unlawfully discharged on June 14, 1976, immediate and full reinstatement to their former jobs, or, if any such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges; and make them whole for any loss of earnings and/or benefits suffered by reason of the unlawful discharges.[21]

(c) Post at its plant in Vancouver, Washington, copies of the attached notice marked "APPENDIX."[22] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are custom-

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[21]Backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977). See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[22]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

arily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

Dated at San Francisco, California: November 3, 1977

/s/ RICHARD J. BOYCE

Richard J. Boyce
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The trial held in Portland, Oregon, on April 19-22 and 25-29, 1977, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a) (1), (3) and (5) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

The National Labor Relations Act gives all employees the following rights:

To organize themselves;

To form, join, or support unions;

To bargain as a group through a representative they choose;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT tell nonshareholder employees that we would have to start "breaking in" the new shareholders

in case the nonshareholders "go union on us"; or tell nonshareholder employees that we would "just shut down" should the Union get in; or interrogate nonshareholder employees whether they had "signed up" with the Union, about what "went on" at a union organizing meeting, and who was "behind" the union activities; or tell nonshareholder employees, with reference to their discharges and their union activities, that they had "asked for it" and had "screwed themselves"; or tell nonshareholder employees that their mass discharge was because of "that union stuff."

WE WILL NOT discharge or otherwise discriminate against nonshareholders because of the union activities of some or all of them.

WE WILL NOT refuse to recognize Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of our nonshareholder employees in the appropriate unit, described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in their exercise of rights under the Act.

WE WILL, upon request, recognize and bargain with Local Union No. 3-3, International Woodworkers of America, AFL-CIO, as the exclusive representative of all nonshareholder employees in the appropriate unit; and, if an understanding is reached, embody it in a signed document if asked to do so. The appropriate unit is:

> All nonshareholder production and maintenance employees employed by Fort Vancouver Plywood Company in its plant at Vancouver, Washington, excluding all shareholders, prospective shareholders, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer to the 72 nonshareholders unlawfully discharged on June 14, 1976, immediate and full reinstatement to their former jobs, or, if any such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges; and make them whole for any loss of earnings and/or benefits suffered by reason of the unlawful discharges.

FORT VANCOUVER
PLYWOOD COMPANY

.....
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 29th Floor, Federal Building, 915 Second Avenue, Seattle, Washington 98174, Telephone Number: (206) 442-7472.

No. 79-956

Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

FORT VANCOUVER PLYWOOD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-13) is reported at 604 F. 2d 596. The Board's decision and order (Pet. App. D-1 to D-3, E-1 to E-47) are reported at 235 N.L.R.B. 635.

JURISDICTION

The amended judgment of the court of appeals was entered on September 17, 1979 (Pet. App. B-1 to B-7), and its order denying petitioner's motion for rehearing was entered on September 20, 1979 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on December 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Company's illegally motivated mass discharge of nonshareholder employees violated Sections 8(a)(3) and (1) of the National Labor Relations Act and did not fall within the liquidation of business exception to liability enunciated in *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

2. Whether the Board properly found that the Company's mass termination of employees and its repeated coercive statements destroyed the conditions necessary for a fair election and therefore that a bargaining order based on the Union's authorization card majority was appropriate.

3. Whether the Board properly refused to reopen the record to adduce additional testimony.

STATUTORY PROVISIONS INVOLVED

Two relevant statutory provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 3. The following provision (29 U.S.C. 158(a)(5)) is also relevant:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. The Fort Vancouver Plywood Company ("the Company") is a worker-owned corporation engaged in the manufacture of plywood in Vancouver, Washington (Pet. App. E-2 to E-3). Not all company workers are

shareholders, however. The Company has employed varying numbers of nonshareholders, who work alongside and interchangeably with shareholders, in all job classifications (Pet. App. E-5, E-35 to E-37).

On June 14, 1976, the Company employed about 335 shareholders and 76 nonshareholders, four of whom were prospective shareholders serving a one-month probationary period before being admitted to shareholder status (Pet. App. E-5). On that date, at a special meeting, the Board of Directors voted to terminate the 72 nonshareholders who were not prospective shareholders,[1] and the Company implemented its decision at the end of the shift in progress (Pet. App. E-11 to E-27). Since that date, the Company has not employed any nonshareholders (Pet. App. E-5).[2]

On June 9, 1976, immediately preceding the mass termination of nonshareholders, Local Union No. 3-3, International Woodworkers of America, AFL-CIO ("the Union") held an organizational meeting at a local restaurant. Seventeen nonshareholders attended the meeting, and sixteen of them signed authorization cards. Other authorization cards were distributed for circulation among the absent nonshareholders. Pet. App. E-6.

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[1]The four prospective shareholders serving probationary periods were excepted from the mass termination (Pet. App. E-5).

[2]The petition states that, shortly after the mass discharge, "the Company's shareholders amended the Corporation's bylaws to preclude any further use of nonshareholder production employees" (Pet. 4). The Company first raised the alleged bylaw change in its post-hearing motion to reopen the record, more than a year after the date of the mass termination (R. 31). The alleged new bylaw was not submitted with that motion, was not presented to the Board, and is not part of the record in this case.

Sometime between June 8 and 10, foreman Harbie Diener observed nonshareholders signing authorization cards in the lunchroom during a break and asked one of them whether he had "signed up for the Union" (Pet. App. E-8; Tr. 320-321, 341-343, 380-381).[3] During a work break on June 13, Ronald Reibel, a member of the Company's Board of Directors, asked a nonshareholder what was "going on with the Union," what "went on" at the June 9 organizational meeting, and "who was behind" the union activity (Pet. App. E-8; Tr. 344-347). On June 14, immediately preceding the Board of Directors' meeting, a nonshareholder asked Plant Superintendent Grenier and supervisor Walt Marugg if he could be switched from graveyard to swing shift. Grenier stated that he did not "see any problem with that." Marugg interjected that the Company had better start "breaking in" the new shareholders "in case these f---ers go union on us." Grenier responded, "If they do, we'll just shut down" (Pet. App. E-7; Tr. 392-393).

After the Directors' meeting, when asked his reaction to the mass termination, supervisor Marugg told several nonshareholders: "You guys asked for it; you just screwed yourselves," or words to that effect (Pet. App. E-9; Tr. 352, 232, 300). Similarly, foreman Diener, when asked the reason for the mass termination, stated: "Well, you know, it was the union stuff (Pet. App. E-9; Tr. 322-324).

By letter of June 14, the Union declared that it had achieved majority status and demanded recognition and reinstatement of the nonshareholders. The Company refused the Union's recognition demand by letter dated

[3]"Tr." references are to the transcript of the hearing before the Administrative Law Judge.

June 15. As of June 16, 41 nonshareholders had signed authorization cards and thereby accorded the Union majority status.[4] The Union repeated its demand for bargaining in a letter of the same date (Pet. App. E-6 to E-7).

2. The Board, affirming the decision of the Administrative Law Judge, found that the Company, through its supervisory personnel, violated Section 8(a)(1) of the Act by questioning employees about their union activities, threatening to replace nonshareholders or to close the plant if it went union, and telling employees that they were laid off because of their union activities (Pet. App. D-1 to D-3, E-7 to E-10, E-40 to E-41). The Board also concluded that the Company's mass discharge of nonshareholders was motivated by anti-union considerations and therefore violated Sections 8(a)(3) and (1) of the Act (Pet. App. D-1 to D-3, E-32 to E-34, E-41). It found that the indicia of improper motivation—timing, knowledge of union activities, animus and failure of the Company's economic defense—were "convincingly present" (Pet. App. E-32 to E-34).

Moreover, the Board found that the Company "perpetrated the most egregious sort of misconduct by its liquidation of the nonshareholder unit; and, in so doing, destroyed any possibility of—and forfeited its right to—an NLRB election as a fair test of employee sentiment concerning union representation" (Pet. App. E-40). Therefore, in addition to requiring reinstatement with backpay for the discharged nonshareholders, and the posting of appropriate notices, the Board, noting that the Union had a clear card majority, ordered the Company

[4]The Board found that at least six cards were signed after the discharges and that at least one of those was backdated to a pre-discharge time (Pet. App. E-38).

to bargain with the Union as the representative of its employees (Pet. App. E-40, E-42 to E-43). The Board also found that, by refusing the Union's repeated demand for recognition, the Company violated Section 8(a)(5) of the Act (Pet. App. E-40, E-41).[5]

3. The court of appeals enforced the Board's order but remanded the reinstatement award to the Board for reconsideration.[6] The court found "more than sufficient evidence" to support the Board's finding that the Company violated Section 8(a)(1) by making coercive statements to its employees (Pet. App. A-3 to A-4). The court also found "ample evidence" that the Company's mass termination of all nonshareholders was unlawfully motivated and further found the "conclusion that a desire to stop unionization outweighed other business purposes * * * reasonable and well-supported" (Pet. App. A-5). The court specifically rejected the Company's contention that, even if illegally motivated, its discharge of all nonshareholders was permissible under *Textile*

[5]The Board also upheld the law judge's refusal to reopen the record for the presentation of allegedly newly discovered evidence (Pet. App. D-2 n.1). The Board agreed with the law judge that the proffered evidence would not shed new light on the validity of the authorization cards. The Board also concluded that the evidence was not shown to have been previously unavailable and that the allegations of more pervasive backdating of cards would not vitiate the validity of the finding of majority status, even if true. Finally, the Board noted that petitioner had delayed making its request for almost two months after its alleged discovery of the new evidence.

[6]Given the record high number of nonshareholders employed on June 14 and the view of three of the seven members of the Board of Directors that the practice of employing nonshareholders should be ended, the court of appeals believed the Board should address the question of how many nonshareholders would have continued to be employed but for the Company's unfair labor practices (Pet. App. A-11). The Board has accepted the remand, and no issue regarding the remand is raised here.

Workers Union v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). Finding the *Darlington* exception applicable "only to the complete liquidation of a business," the Court held that "[a]nti-union firings that fall short of terminating business operations completely, such as the discharges here, violate section 8(a)(3)" (Pet. App. A-6; citation omitted).

The court upheld the Board's bargaining order, holding that, "in view of the repeated and drastic nature of the coercive behavior and discharges, the [administrative law] judge reasonably concluded that only a bargaining order would effectuate employees' expressed preference for the union" and that an election would not effectuate employee preferences (Pet. App. A-8).

Finally the court concluded that it was "hardly an abuse" of the Administrative Law Judge's "considerable discretion" to refuse to reopen the record to receive the alleged newly discovered evidence (Pet. App. A-7).

ARGUMENT

1. Petitioner no longer contests the finding that it discharged its nonshareholder workers for anti-union reasons, rather than for the economic considerations or policy reasons it urged before the Board. Instead, it contends (Pet. 8-13) that the Board was barred by this Court's decision in *Darlington*, *supra*, from finding its anti-union conduct violative of the Act. *Darlington*, however, has no application here.

In *Darlington*, this Court carved out a very narrow exception to the general principle that an employer's

discharge of workers for anti-union reasons violates Section 8(a)(3) of the Act (380 U.S. at 273-274; footnote omitted):

> We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.

This exception recognizes an "employer's right to go out of business." 380 U.S. at 272. Here petitioner did not cease manufacturing plywood or terminate a distinct portion of its business. It made no structural changes in its enterprise, but continued to operate as before. All petitioner did was discharge those production and maintenance employees who had attempted to unionize and require the remaining work force to shoulder an increased burden in running the continuing enterprise.[7]

2. There is no merit to petitioner's argument (Pet. 15-17) that the rationale of this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), does not apply where a union in fact gains majority strength *after* an employer commits unfair labor practices. In *Gissel*, this Court held that a bargaining order may issue on the

[7]In *Darlington*, the Court held (380 U.S. at 275) that "a partial closing is an unfair labor practice * * * if motivated by a purpose to chill unionism in any of the remaining plants of the single employer * * *." Since there was no partial closing of operations here, the Board was not required to make the latter determination. In any event, employees who are shareholders are employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3) (see *Olympia Shingle Co.*, 26 N.L.R.B. 1398, 1414 (1953); *Everett Plywood & Door Corp.*, 105 N.L.R.B. 17, 18-19 (1953)), and, even assuming the amendment to the bylaws petitioner alleges (Pet. 4; see note 2, *supra*), there could be no assurance that the bylaws would not be amended in the future to permit employment of nonshareholders once again. Therefore, petitioner's assertion (Pet. 12-13) that its action could have no purpose to chill unionism in the future is without merit.

basis of authorization cards where the employer's unfair labor practices have a tendency to undermine majority strength and impede the election process. 395 U.S. at 613-614. Here, many of the employees signed authorization cards before petitioner committed the most egregious of its unfair labor practices—the mass termination of nonshareholders. Such an unfair labor practice could reasonably be expected to have an impact on this pre-existing portion of the Union's majority strength. While other of petitioner's nonshareholder employees may have signed authorization cards immediately after their discharge, it is nevertheless likely that in an election, they too would dwell on the fact that petitioner's objection to unionization is so great that it preferred to fire them all rather than deal with a union, and thus be prompted to vote against the Union as the safest means of regaining and retaining their jobs. As this Court stated in *Gissel*, *supra*, concerning the process of validating authorization cards: "any rule that requires a probe of an employee's subjective motivations * * * involv[es] an endless and unreliable inquiry" (395 U.S. at 608).[8] Here, an objective assessment of the unfair labor practices fully supports the bargaining order.

3. Petitioner's further contention (Pet. 13-14) that the Company was denied due process by the Board's refusal to reopen the record raises no issue appropriate for review by this Court. The Board denied the request because no showing had been made that the proffered evidence would affect the outcome or that it was not

[8]Contrary to petitioner's contention (Pet. 17 n.5), the Board set forth its reasons for issuing a bargaining order (Pet. App. E-40), and the court of appeals found the Board's discussion satisfactory and its conclusion reasonable (Pet. App. A-8).

previously available, and, in any event, the request was untimely (note 5, *supra*). The petition merely raises the essentially factual question of whether, on this record, the court of appeals was correct in concluding that the Board's ruling was not an abuse of its broad discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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